Supreme Court, U. S.
FILED
JUN 2 1977
RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1976

No. .....

76-1709

ARTHUR YOUNG & COMPANY and OTIS CHANDLER,

Petitioners,

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, HONORABLE WILLIAM T. SWEIGERT, UNITED STATES SENIOR JUDGE PRESIDING; ALBERT A. KAUFMAN; JOE EBNER; JAMES HOWENSTINE; and THE 5-H INVESTMENT CLUB,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, HONORABLE WILLIAM T. SWEIGERT, UNITED STATES SENIOR JUDGE PRESIDING; ALBERT A. KAUFMAN; JOE EBNER; JAMES HOWENSTINE; and THE 5-H INVESTMENT CLUB,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners Arthur Young & Company and Otis Chandler, two of the defendants in securities fraud actions below, respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit, entered in these proceedings on March 4, 1977, denying petitioners' petition for a writ of mandamus, prohibition or other appropriate writ. That petition sought, *inter alia*, to vacate and set aside a class action certification order bifurcating jury trials, entered by the United States District Court for the Northern District of California on April 21, 1975.[1]

[1]The District Court refused to certify its order for interlocutory appeal under 28 U.S.C. §1292(b) and the Court of Appeals refused to issue a writ of mandamus compelling the District Court to certify its order for interlocutory appeal. Additionally, the Court dismissed petitioners' appeal, taken pursuant to 28 U.S.C. §1291, from the class action certification order.

The Court of Appeals' order deprives petitioners of their Seventh Amendment right to a jury trial by upholding the District Court's "novel and innovative"[2] class action certification order. To force these proceedings into the class action form, that order fragments the basic question of the liability of these defendants to approximately 1,700 differently situated investors into a collection of "issues." It excludes from the class trial and reserves for later separate jury trials many substantial issues of liability, as well as damages, despite the fact that these "issues" are inseparable from and in fact correlative parts of the questions to be resolved at the class trial.

Opinions Below.

The opinion and order of the United States Court of Appeals for the Ninth Circuit is reported at 549 F.2d 686 and appears in the Appendix hereto at pages A1 through A27. The order of the United States District Court for the Northern District of California, not reported, appears in the Appendix hereto at pages A28 through A34.

Jurisdiction.

The order of the United States Court of Appeals for the Ninth Circuit was entered on March 4, 1977, and this petition for a writ of certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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[2]App. at A24; 549 F.2d at 697.

Question Presented.

Are litigants in securities fraud damage actions deprived of their Seventh Amendment right to a jury trial by a federal district court's order splintering the basic question of liability into a collection of "issues," certifying these actions for class treatment and trial under Rule 23(b)(3) of the Federal Rules of Civil Procedure on limited issues only, and excluding therefrom and reserving for later separate trials not only the issue of individual damages but also many substantial issues of liability that are inseparable from and in fact correlative parts of the questions to be resolved at the class trial?

Constitutional Provision, Statute, and Rules Involved.

The constitutional provision involved is the Seventh Amendment to the United States Constitution.[3]

The statute involved is the Enabling Act, 28 U.S.C. §2072.[4]

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[3]The Seventh Amendment provides:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

[4]28 U.S.C. §2072 provides in pertinent part:

"The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein. . . .

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

* * * *"

The rules involved are Rule 23, Rule 38(a), and Rule 42(b) of the Federal Rules of Civil Procedure.[5]

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[5]Rule 23, F.R. Civ. P., provides in pertinent part:

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

"(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * * *

"(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

"(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

* * * *

"(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

* * * *"

Rule 38(a), F.R. Civ. P., provides:

"(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

Rule 42(b), F.R. Civ. P., provides:

"(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States."

Statement of the Case.

Petitioners are among the defendants in three separate securities fraud damage actions, now consolidated and certified as class actions, pending in the United States District Court for the Northern District of California and involving the securities of some ten oil ventures, each expressly advertised as "speculative", sold over an eight-year period primarily by personal contact to sophisticated, high tax bracket investors seeking tax write-offs.[6] The actions were consolidated with a non-class action by individual investors and an enforcement action initiated by the Securities and Exchange Commission. The gravamen of each action was the charge that Jack Burke, the primary creator and promoter of the oil ventures, utilized fraudulent schemes to divert funds from the ventures for his own use and benefit.

The SEC action was dismissed as against petitioner Chandler on his making certain representations to the Court and the SEC stipulating that it did not contend that Chandler intentionally violated any securities laws. As to petitioner Arthur Young & Company, the SEC action was tried before United States District Judge Sweigert during the summer and early fall of 1975. After thirty-four days of trial, the Court issued an opinion which found in favor of Arthur Young in all

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[6]The smallest investment permitted in any of these ventures was $5,000 and the largest amount invested was in excess of $1,000,000.

respects. Indeed, the Court found "not a scintilla of evidence" of intentional wrongdoing or of conduct amounting to an intent to deceive on the part of Arthur Young. Moreover, the Court found that Arthur Young had not acted negligently in performing its audit responsibilities.[7]

From 1964 through 1968 Mr. Burke, through his controlled company, J. B. Oil Company, sold a series of California intrastate offerings of J. B. Oil Exploration Programs pursuant to permits from the California Commissioner of Corporations to approximately 500 investors who invested approximately $13 million.[8] Because the securities were not registered, no formal prospectuses were employed in connection with the marketing of the securities; rather, so-called "offering circulars" and other literature were distributed. In fact, however, because of the relatively small number of investors in the J. B. Programs, Mr. Burke and his sales executive, Robert Mount, were able to close sales by making personal sales presentations to each prospective investor.

In 1969, Mr. Burke caused GeoTek Resources Fund, Inc. and GTR Management Company to be incorporated. These entities then formed five limited partnerships in the years 1969 through 1971 to engage in oil and gas drilling activities. Limited partnership interests were sold throughout the United States to approximately 1,200 investors who paid in approximately $17 million. Prospectuses filed under federal law with the Securities

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[7]*Securities & Exchange Commission v. GeoTek*, 426 F.Supp. 715 (N.D. Cal. 1976).

[8]Interests in these ventures were subsequently exchanged for stock in corporations known as Petroleum 2000 Corporation and Petroforce Corporation, created solely for that purpose.

and Exchange Commission were issued; however, a substantial sales force engaged in person-to-person solicitation and an army of brokers and investment advisors actually effected the sales.

In 1972, 1973 and 1974, respectively, certain investors filed the *Kaufman* action,[9] the *Ebner* action[10] and the *Howenstine* action[11] against Mr. Burke, various other defendants and these petitioners,[12] demanding a jury trial in each action. Plaintiffs Ebner and Howenstine sought to represent the investors in the 1964 through 1968 J. B. Oil Company Programs, alleging violations of Rule 10b-5 (17 C.F.R. §240.10b-5); plaintiff Kaufman claimed to represent the interests of investors in the five GeoTek funds, alleging violations of Rule 10b-5 and Sections 12(2) and 17 of the Securities Act of 1933 (15 U.S.C. §§77*l*(2), 77q).[13]

After a series of pretrial proceedings in the District Court, during which the three actions were consolidated

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[9]*Kaufman v. Burke, et al.*, N.D. Cal. No. C-72-1473-WTS.

[10]*Ebner v. Petroleum 2000 Corp., et al.*, N.D. Cal. No. C-73-0176-WTS.

[11]*Howenstine, et al. v. Petroforce Corp., et al.*, N.D. Cal. No. C-74-0957-WTS.

[12]Arthur Young & Company was charged with liability for reporting on the financial statements of the J. B. Programs, although its reports were issued *after* the interests were sold. *See Raschio v. Sinclair*, 486 F.2d 1029 (9th Cir. 1973). With respect to GeoTek, Arthur Young was charged only with responsibility for alleged misstatements in the text of prospectuses. Chandler was charged with having acted, along with other uncharged parties, as a "finder" of individuals interested in investing in the J. B. Programs and was a GeoTek director, along with other charged and not charged individuals.

[13]Plaintiff Kaufman now contends that his action is also brought under Section 11 of the Securities Act of 1933 (15 U.S.C. §77k), although this section was not pleaded either at the inception or by amendment as a basis for relief. *See* App. at A4; 549 F.2d at 689.

with each other, the individual action and the enforcement action, on April 21, 1975, the District Court entered its "novel" class action certification order[14] that, *inter alia:*

1. Certified the *Kaufman, Ebner,* and *Howenstine* actions for class treatment as to certain issues only,[15] excluding therefrom and *reserving for later separate jury trials (necessarily involving approximately 1,700 investors) the issues of reliance, causation, duty, knowledge of facts allegedly misrepresented or omitted, statutes of limitations, laches, waiver, estoppel, ratification, unclean hands, pari delicto, and individual damage considerations.*

2. Excluded any evidence of alleged oral representations.

3. Contemplated a series of subsequent trials of the excluded issues for each class member in the event of a favorable decision for plaintiffs in the class trial, to commence no earlier than 90 days after such a decision.

The District Court entered this order notwithstanding the fact that petitioners presented extensive evidence demonstrating the unsuitability of these actions for class treatment.[16] As the Court of Appeals conceded:

[14]App. at A28 to A34.

[15]The District Court's order does not indicate what issues are to be decided at the class trial. However, through the process of elimination petitioners assume that the issues to be decided are whether selected writings contain misrepresentations or omissions that would have been material to a "reasonable" investor.

[16]Petitioners were extended an unusual opportunity to assemble evidence respecting the individual conduct, knowledge and motivations of a relatively substantial number of investors by gaining access to the product of an extensive SEC investigation. Although the class action plaintiffs had the burden of justifying class certification (*see Valentino v. Howlett,* 528 F.2d 975, 978 (7th Cir. 1976); *Albertson's, Inc. v. Amalgamated Sugar Co.,* 503 F.2d 459, 463 (10th Cir. 1974); *Davis v. Romney,* 490 F.2d 1360, 1366 (3d Cir. 1974)), they offered no such evidence other than the written sales literature upon which they now base their action. In view of this imbalance of evidence, and the rare quantity of individual proof able to be presented by petitioners, it was dismaying that the Court of Appeals effectively reversed the burden of proof by holding that petitioners had not "yet demonstrated that the proof of non-reliance which they expect to submit at the later trial is of such volume as to be significant to the district court's resolution of the Rule 23 issue" and similarly had "failed to demonstrate" that the existence of the other individual issues are "so prevalent" as to cause extensive additional proof. App. at A21-A22; 549 F.2d at 695-696. Petitioners respectfully submit that no class action defendant could develop a greater quantum of such evidence short of taking the deposition of each potential class member, a procedure unlikely to be permitted and not financially tolerable in any event.

"In opposition to the motion to certify the classes, petitioners submitted evidence which they contend demonstrates the impropriety of the class certifications. They presented their own exhibits and affidavits, as well as responses given in discovery by named plaintiffs. The evidence which petitioners presented indicates that some interests in each of the J. B. Ventures were sold by means of oral presentations given to investors by Burke and another defendant. Petitioners contend that the other defendants, including themselves, did not participate in these solicitations. In making their investment decisions, say the petitioners, some of the investors relied on these presentations, or on the advice of others, and not on any written material. Some of these investors had personal contact with the defendants, say petitioners, but others did not. The petitioners have further shown that the investors in the J. B. Ventures were sophisticated investors with high incomes. They

contend that these investors were looking for risky investment as tax write-offs, and that some members of the *Ebner* and *Howenstine* classes were dissatisfied with the Burke programs as early as 1966 and had made inquiries and complaints to various agencies some time prior to 1970.

"In addition, the petitioners raise questions about special arrangements, such as finders' fees and kickbacks, which Burke had with some class members. Furthermore, petitioners note that the Geotek partnerships were also sold to high income investors through oral presentations; as set out in *Kaufman*'s complaint, and as stated by him in deposition, he bought his Geotek interest after such a presentation. Finally, petitioners presented some evidence relating to the possible conflicts between the respective class representatives and their classes. All of this information was, of course, before the district court when it made its determination to certify the classes."[17]

The District Court correctly recognized the substantial nature of non-common issues raised by this evidence and that the three actions could not possibly proceed as class actions upon these issues. The District Court's solution, however, amputating the bulk of the substantive requirements of a securities fraud claim in order to force these actions into the class action form, (i) forces petitioners into a class trial in an artificially created vacuum in which the jury is charged with determining whether there were "material misrepresentations and omissions" in selected writings while being prevented from receiving evidence as to the individual circumstances surrounding the presentation and utilization of these writings as well as evidence with respect to the knowledge, sophistication and conduct of each investor, including particularly the actual knowledge of each investor of the matters that were being represented, and (ii) thereby infringes petitioners' Seventh Amendment right to a unitary trial by jury on inseparable and interrelated issues.[18]

[17]App. at A6-A7; 549 F.2d at 689-690. Although this statement fairly includes the subject matter of the evidence presented, it does not, of course, elaborate the details of that evidence in a fashion most favorable to petitioners.

The Court of Appeals' refusal, by its order of March 4, 1977, to issue a writ of mandamus vacating and setting aside the District Court's order erroneously upholds this unconstitutional deprivation of petitioners' right to a jury trial and condemns both petitioners and the judicial system to the irreparable harm of a fruitless class trial followed by multiple mini-trials extending over an indeterminate period of time, unless petitioners faced with this bleak prospect submit to a forced settlement.

[18]Although not central to this petition, the order also (i) does not comport with the purpose of Rule 23 of the Federal Rules of Civil Procedure, (ii) twists the substantive law to accommodate class procedures, and (iii) potentially condemns petitioners as well as the District Court to years of mini-lawsuit jury trials (each involving the full panoply of discovery, etc.) with individual sophisticated investors who but for the class certification order had made an informed decision not to sue. Of course, if this petition is granted these issues as well will become pertinent to the proceedings before this Court.

REASONS FOR GRANTING THE WRIT.

A writ of certiorari is sought from this Court on the grounds that:

1. The important and recurring constitutional question of whether, consistent with the Seventh Amendment to the United States Constitution, bifurcated jury trials on inseparable and interrelated issues (forming, pragmatically viewed, a unitary question of liability) may be utilized to accommodate the class action procedural device of Rule 23 of the Federal Rules of Civil Procedure has not been settled definitively.

2. The absence of guidance on this significant issue will lead inevitably to the infusion of fatal error into a substantial number of major business lawsuits pending in the lower federal courts.[19]

3. The constricted standard adopted by the Court of Appeals for review by mandamus of the denial of petitioners' effective right to jury trial conflicts with applicable decisions of this Court requiring that "any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."[20]

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[19]As developed below in Part I, the absence of such definitive guidance has led to substantial confusion on this very issue in several of the circuits.

[20]*Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 501 (1959), quoting *Dimick v. Schiedt,* 293 U.S. 474, 486 (1935).

I

The Seventh Amendment Right to a Jury Trial Prohibits the Bifurcation of Jury Trials on Inseparable and Interrelated Issues in Order to Facilitate Certification of a Class Action Under Rule 23 of the Federal Rules of Civil Procedure.

Mr. Justice Story, speaking for this Court in *Parsons v. Bedford,* 28 U.S. (3 Pet.) 433, 446 (1830), observed that "trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. * * *" Since that time, this Court consistently has recognized that the right to trial by jury is an "important constitutional right" (*e.g., Dairy Queen, Inc. v. Wood,* 369 U.S. 469, 470 (1962)) to be protected from curtailment by inferior courts who might find a jury to be an impediment to "efficient" adjudication of disputes. *E.g., Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 501 (1959).

Nevertheless, this important constitutional right is currently in jeopardy, and there is confusion in the inferior federal courts as to its implementation, because of the seeming exigencies of massive business litigation. A federal district judge recently concluded that he should strike plaintiffs' jury demands in securities fraud litigation because of his finding that the "factual issues, the complexity of the evidence that will be required to explore those issues, and the time required to do so leads to the conclusion that a jury would not be

a rational and capable fact finder." *In Re Boise Cascade Securities Litigation,* 420 F.Supp. 99, 103 (W.D. Wash. 1976). The same drastic step has been proposed by another federal district judge, on his own motion, in an unreported order filed May 13, 1977, in *In re U.S. Financial Securities Litigation* (M.D.L. No. 161, S.D. Cal.).

The District Court below, and district courts in the Second and Third Circuits, have utilized the tool of "bifurcation" to similarly thrust aside procedural impediments perceived to result from a jury trial. The review by the Court of Appeals in each circuit suggests the propriety of the device (and thus assures its implementation by district judges eager to resolve litigation without suffering procedural impediments), but actually refrains from tackling the issue head-on because of self-imposed limitations upon the standard of review.

The Court of Appeals below hobbled its investigation into the propriety of the "innovative" certification and bifurcation order by the unduly limited standard of mandamus review employed. In *Link v. Mercedes-Benz of North America, Inc.,* 550 F.2d 860 (3d Cir. 1977), *cert. den.,* — U.S. —, the Third Circuit Court of Appeals, sitting *en banc,* was confronted with the same Seventh Amendment question in an antitrust action brought under Section 4 of the Clayton Act. Although the district court had certified for interlocutory appeal the question of a bifurcated trial of liability and damage issues with separate juries for each segment of the case, a panel of the Circuit had accepted the case for appeal, and certain members of the Court were of the opinion that the constitutional issue presented was "difficult and important" and involved a "present,

live controversy" that should be decided,[21] the appeal was dismissed as constituting a request for an "advisory opinion."

A panel of the Court of Appeals for the Second Circuit dismissed a similar appeal, indicating that the question of the propriety of a bifurcated jury trial in a class action context was premature since "one jury may hear both the liability and damage claims in this action." *In Re Master Key Antitrust Litigation,* 528 F.2d 5, 15 (2d Cir. 1975). While remarking generally that "bifurcated trials have frequently been employed with great success," *Ibid.,* that Court failed to appreciate that splintered jury trials raise Seventh Amendment issues quite apart from whether or not the same jury will hear each segment.

These decisions, along with the instant proceedings, dramatically demonstrate the need for guidance. In the absence of a definitive statement from this Court, the unsettled and contradictory opinions of judges of the Courts of Appeals provide the district courts with absolutely no assistance in resolving this important and recurring constitutional question.[22]

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[21]550 F.2d at 867.

[22]The fact that the District Court in *Link, supra,* certified the bifurcated jury trial question for interlocutory appeal obviously indicates that the Court felt the question was a controlling one as to which there was substantial ground for difference of opinion and that the Court needed guidance. Similarly, the District Court in *Boise Cascade, supra,* felt that its outright denial of a jury trial should be certified for interlocutory appeal but the plaintiffs declined to proceed with the appeal. *See also State of Alabama v. Blue Bird Body Co., Inc.,* 71 F.R.D. 606 (M.D. Ala. 1976), an antitrust case in which the District Court recently ordered a national class trial on liability and separate jury trials in other districts on damages. The Court certified the question for interlocutory appeal, stating that it

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But the portent of the statements by the Courts of Appeals found in the foregoing opinions ensures continued and extensive experimentation by district courts with orders which have the direct or at least practical effect of depriving parties of the right to trial by jury in complex cases, particularly where a class certification has been sought. Unless the constitutional issue of the propriety of such experimentation is faced now, and definitively, a multitude of cases involving many millions of dollars of alleged liability, and imposing millions of dollars of expense upon the participants and the judicial system, bid fair to produce only tainted results in the form of voidable judgments or settlements predicated upon unconstitutional coercion.

A. The Seventh Amendment Right to a Unitary Jury Trial.

Every experienced trial lawyer understands that a trial, whether before a judge or jury, does not consist of presentation of a number of isolated and distinct issues to be resolved *seriatim*. Rather, it is an attempt to recreate by description and reenactment a segment of time during which the plaintiffs and defendants interrelated in some manner. From that presentation, the trier of fact forms a judgment as to whether the defendants acted improperly to the detriment of the plaintiffs. In a securities fraud litigation context, the essential determination being made by the trier of fact is whether or not the defendants have misled the plaintiffs to their damage in connection with the purchase or sale of securities. In resolving this issue, a jury

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was of the "strong opinion" that its order involved a controlling question of law as to which there was substantial ground for difference of opinion and that it would not afford class action treatment to the case unless its bifurcated jury trial order was proper. 71 F.R.D. at 616.

cannot make its determination rationally when presented with the transaction piecemeal by being offered nothing but vignettes of both sides of the transaction.

The constitutional right to jury trial to be meaningful must include the right to a single hearing on all interrelated issues, not fragmentary hearings, each in a vacuum and possibly before different juries.

In 1931, this Court in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), refused to approve the partial retrial of a contract claim on the issue of damages without retrial of the related liability issues, because the jury could not adequately fix the amount of damages unless it was also permitted to decide the terms of the contract and the dates of formation and breach. This Court announced the following test for determining the constitutional propriety of a jury retrial of only a portion of the issues posed by the litigation:

> "Where the practice permits a partial new trial, it may not properly be resorted to unless it *clearly appears* that the issue to be retried is *so distinct and separable* from the others that a trial of it alone may be had without injustice. [Citations omitted.] Here the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial." [Emphasis added.] 283 U.S. at 500.

Although the decision concerned partial retrials after appellate proceedings, the concepts of the holding are necessarily equally pertinent to bifurcation of issues for trial in the first instance.

No rules promulgated since the *Gasoline Products* decision may or do sanction a reduction in the scope of a litigant's Seventh Amendment right to a unitary jury trial. The Enabling Act, which authorized this Court to adopt the Federal Rules of Civil Procedure, clearly provides that those rules "shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution". 28 U.S.C. §2072. This limitation was expressly endorsed by this Court in *Snyder v. Harris*, 394 U.S. 332, 336 (1969). Moreover, the right of trial by jury as declared by the Seventh Amendment is expressly preserved inviolate by Rule 38(a) and also by Rule 42(b), which authorizes federal district courts to order separate trials on "any separate issue[s]" subject to the admonishment that a court in exercising such discretion must "always preserv[e] inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution. . . ." Significantly, the Advisory Committee Note to the 1966 Amendment to Rule 42 states:

> "In cases . . . in which the parties have a constitutional or statutory right of trial by jury, separation of issues may give rise to problems. See e.g., United Air Lines, Inc. v. Wiener, 286 F.2d 302 (9th Cir. 1961). Accordingly, the proposed change in Rule 42 reiterates the mandate of Rule 38 respecting preservation of the right to jury trial." F.R. Civ. P., Rule 42, Advisory Committee Note.

Pursuant to the Enabling Act, the provisions of Rule 23, and particularly Rule 23(c)(4)(A) providing

for certification of a class with respect to particular issues only, are of course subject to the same admonition that the right of trial by jury must be preserved inviolate. It is settled that as an absolute minimum a litigant in a class action may obtain a jury trial on any legal issues presented. *Ross v. Bernhard*, 396 U.S. 531, 541 (1970).

In contexts other than class actions, the lower federal courts have recognized that separate or bifurcated trials on certain issues violate a litigant's Seventh Amendment right to trial by jury where it does not clearly appear that the issues severed are so distinct and separable that a bifurcated trial might be had without injustice. The Court of Appeals for the Ninth Circuit itself so held in the case of *United Air Lines, Inc. v. Wiener*, 286 F.2d 302 (9th Cir. 1961), *cert. den.*, 366 U.S. 924,[23] reversing an order of the District Court which provided for a consolidated trial of liability issues in twenty-three cases arising from an aircraft disaster, reserving damages for later individual trials. The Court of Appeals noted that "the issues of liability and damages, exemplary or normal, are not so distinct and separable that a separate trial of the damage issues may be had without injustice." 286 F.2d at 306.[24]

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[23]*See also C. W. Regan, Inc. v. Parsons, Brinckerhoff, Quade & Douglas*, 411 F.2d 1379, 1388 (4th Cir. 1969); *Reliable Volkswagen Co. v. World-Wide Auto. Corp.*, 34 F.R.D. 134, 138-39 (D.N.J. 1963).

[24]More recently, in the class action context some lower federal courts have recognized that this same Seventh Amendment restriction on use of the bifurcation device applies. *See, e.g., Katz v. Carte Blanche Corp.*, 496 F.2d 747, 762 (3d Cir. 1974), *cert. den.*, 419 U.S. 885; *Lah v. Shell Oil Co.*, 50 F.R.D. 198, 200 (S.D. Ohio 1970). Other lower federal courts have refused to certify purported class actions because of the severe manageability and lack of superiority

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But it is obvious from the action of the Courts below and those in the Third and Second Circuits that the teaching of *Gasoline Products* has been dissipated and that the important constitutional right of trial by a jury of one's peers will not be protected adequately. Rather, the reality of trial presentation will be sacrificed to promoting the efficient disposition of expanded class actions. In accomplishing that unconstitutional result here,[25] the Court of Appeals, while acknowledging this Court's decision in *Gasoline Products* and its own decision in *United Air Lines,* utilized an incorrect test to determine whether the Seventh Amendment requires a unitary jury trial in these proceedings.[26] Thus, the Court of Appeals held:

> "[W]e cannot say, as a matter of law, that the reserved issues are so 'interwoven' with the class issues that presentation of all the issues together at one hearing before one trier of fact is necessary to comport with the guarantees of the Seventh Amendment." App. at A16; 549 F.2d at 694.

This test, however, is not the test announced by this Court in *Gasoline Products.* According to *Gasoline*

problems created by adherence to the Seventh Amendment right to trial by jury. *See Schaffner v. Chemical Bank,* 339 F.Supp. 329, 337 (S.D.N.Y. 1972); *Bogosian v. Gulf Oil Corp.,* 62 F.R.D. 124, 139 (E.D.Pa. 1973); and *Morris v. Burchard,* 51 F.R.D. 530, 535 (S.D.N.Y. 1971).

[25]The Court of Appeals here appeared to be more concerned with encouraging "novel and innovative" experimentation by district courts confronted with the perceived exigencies of "modern litigation of substantial complexity" than with protecting against the inevitable dissipation of the Seventh Amendment right to trial by jury caused by such experimentation. App. at A15, A24; 549 F.2d at 693, 697.

[26]The Court of Appeals also applied an improper standard for review by mandamus of the bifurcated jury trial aspect of the District Court's class action certification order. *See* Part II *infra.*

Products the burden is *not* upon petitioners to demonstrate "as a matter of law" that the issues reserved for separate trials are "so interwoven" with the class issues as to require a unitary jury trial but rather, as discussed above, the burden is upon those who advocate separate jury trials to demonstrate that the reserved issues *clearly appear* to be *so distinct and separable* from the class issues that a trial of the reserved issues alone may be had without injustice.

B. The Issues Reserved by the District Court for Separate Individual Jury Trials Are Substantial and Interrelated With "Class" Issues of Misrepresentation, Omission and Materiality.

The transactions at issue, involving direct sales to approximately 1,700 investors over a period of eight years, were not impersonal market transactions. The securities were purchased in fixed price units through personal solici ations and there was no "market price" dependent upon information issued by any defendant.[27] The "classes" do not purport to include any purchasers in a secondary market. Consequently, individual proof will be crucial respecting at least the following inseparable and interrelated elements.

Whether the communications to investors were misleading. In determining whether communications to an

[27]Unlike *Blackie v. Barrack,* 524 F.2d 891 (9th Cir. 1975), *cert. den.,* —U.S.—, the instant litigation involves no alleged "fraud on the market". It is inexplicable that the Court of Appeals purported to find similarities between the facts in *Blackie* and those presented in this action. App. at A18; 549 F.2d at 694-695. There, Ampex shares were traded on the market impersonally; it was alleged that misleading financial statements inflated the market price until corrected; accordingly, it was not essential to the claim that individual investors even have known of the financial statements. No such "fraud on the market" facts are involved with respect to the securities here at issue.

investor were misleading, the trier of fact must analyze all of the contemporary oral and written communications in their totality, rather than focusing upon only one such communication, and must consider the sophistication, motivations and actual knowledge of each investor, derived from sources other than the black and white of a prospectus, at least here where direct personal sales, entailing numerous oral communications by salesmen, sophisticated investors and their advisors, are involved, not broad, impersonal securities market transactions. *See, e.g., Titan Group, Inc. v. Faggen,* 513 F.2d 234, 238-239 (2d Cir. 1975), *cert. den.,* 423 U.S. 840; *United States v. Koenig,* 388 F.Supp. 670, 716 (S.D.N.Y. 1974); *ICM Realty v. Cabot, Cabot & Forbes Land Trust,* 378 F.Supp. 918 (S.D.N.Y. 1974); *McMerty v. Burtness,* 72 F.R.D. 450, 455 (D.Minn. 1976); *Morris v. Burchard,* 51 F.R.D. 530, 534 (S.D.N.Y. 1971).

Whether the complaining investor in fact was misled by the communications to him—i.e., did he "rely" and were the statements made the "cause" of his injury. It is only rational, particularly in situations not involving impersonal open market transactions, that an investor to recover upon the ground of securities fraud must demonstrate that the communications made reached him and were the cause of an investment decision. This element of a securities fraud claim remains firmly engrained in the law,[28] as this Court's

[28]*Holdsworth v. Strong,* 545 F.2d 687, 695-96 (10th Cir. 1976); *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath,* 540 F.2d 27, 33 (2d Cir. 1976); *Titan Group, Inc. v. Faggen,* 513 F.2d 234, 238-39 (2d Cir. 1975), *cert. den.,* 423 U.S. 840; *Chelsea Assoc. v. Rapanos,* 527 F.2d 1266 (6th Cir. 1975); *Raschio v. Sinclair,* 486 F.2d 1029, 1030 (9th Cir. 1973); *Landy v. Federal Deposit Insurance Corporation* (3rd Cir. 1973), 486 F.2d 139, 167-71, *cert. den.,* 416 U.S. 960;

recent decision in *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S 723 (1975), amply illustrates:

> "The very real risk in permitting those in respondent's position [neither purchaser nor seller of securities] to sue under Rule 10b-5 is that the door will be open to recovery of substantial damages on the part of one who offers only his own testimony to prove that he ever *consulted a prospectus of the issuer, that he paid any attention to it, or that the representations contained in it damaged him.*" [Footnote omitted. Emphasis added.] 421 U.S. at 746.[29]

The practical effect of these rules is of course that in the instant proceedings a careful and rational examination by a single jury of the total circumstances surrounding the decision to invest by each of the investors in the ten oil ventures is necessary to determine whether any investor actually was misled to his detriment. Even the Court of Appeals' summary of the evidence presented by petitioners[30] reveals that there

Rochez Bros., Inc. v. Rhoades, 491 F.2d 402, 410 (3d Cir. 1974); *Financial Indus. Fund, Inc. v. McDonnell Douglas Corp.* (10th Cir. 1973), 474 F.2d 514, 517, 521, *cert. den.,* 414 U.S. 874; *REA Express, Inc. v. Interway Corp.,* 410 F.Supp. 192, 199 (S.D.N.Y. 1976), *reversed on other grounds,* 538 F.2d 953 (2d Cir. 1976); *McMerty v. Burtness,* 72 F.R.D. 450, 455 (D.Minn. 1976). Some courts have considered the element of "reliance" under the heading of "causation," holding that a misrepresentation, misleading statement, or omission must have a cause in fact relationship with damage suffered or must be a substantial factor in causing damage. *See, e.g., Jackson v. Oppenheim,* 533 F.2d 826 (2d Cir. 1976); *Shapiro v. Merrill Lynch, Pierce, Fenner & Smith,* 495 F.2d 228, 239 (2d Cir. 1974); *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.,* 480 F.2d 341 (2d Cir. 1973), *cert. den.,* 414 U.S. 910; *Globus v. Law Research Service, Inc.,* 418 F.2d 1276, 1291-92 (2d Cir. 1969), *cert. den.,* 404 U.S. 941.

[29]And see opinions of Powell, J., joined by Stewart, J., and Marshall, J., 421 U.S. at 757-61, and Blackmun, J., joined by Douglas, J., and Brennan, J., 421 U.S. at 770-71.

[30]App. at A6-A7; 549 F.2d at 689-90.

are genuine issues indeed as to whether investors in these various ventures relied upon the miscellaneous writings selected by plaintiffs or rather upon side deals, finders' fees and other benefits conferred by Jack Burke, oral representations, investment advisors and counselors, or other factors for which petitioners have no responsibility.

Whether the claims of the various claimant-investors are barred by virtue of defenses arising from their conduct. The facts presented by petitioners in opposition to certification of classes in these proceedings indicate that the claims of substantial numbers of the purported investor-class members are subject to defenses of waiver, estoppel, laches, ratification, unclean hands, statutes of limitations, and *pari delicto*. *See Winkelman v. Blyth & Co., Inc.*, 518 F.2d 530 (9th Cir., 1975), *cert. den.*, 423 U.S. 929; *James v. DuBreuil*, 500 F.2d 155 (5th Cir. 1974); *Turner v. Lundquist*, 377 F.2d 44 (9th Cir. 1967); *Royal Air Properties, Inc. v. Smith*, 312 F.2d 210 (9th Cir. 1962). For example, the *Ebner* action, the *Howenstein* action and the *Kaufman* action each were brought after the expiration of the time specified in the applicable statutes of limitations.[31] In such circumstances, it is well settled that the plaintiff-investors must carry the burden of demonstrating an excuse for failure timely to discover the bases for their purported claims.[32] Obviously the resolution of such issues cannot be accomplished rationally without considering the total circumstances involved, including the conduct of each investor and the amount of information that each investor had or learned about the various oil ventures.

[31]The Rule 10b-5 claims are subject to the three year statute of limitations in Section 338(4) of the California Code of Civil Procedure which begins to run when the essential circumstances of the supposed fraud are, or should have been, discovered by the plaintiff-investor. *United California Bank v. Salik*, 481 F.2d 1012, 1015 (9th Cir. 1973); Plaintiff Kaufman's Section 12(2) claim is expressly covered by Section 13 of the Securities Act of 1933 (15 U.S.C. §77m) which requires such a claim to be brought "within one year after discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence. . . ."

Whether each investor suffered any damage, and if so, how much. Investors in the oil ventures invested for the express purpose of obtaining tax benefits and presumably they did so. Consequently, petitioners submit that they should be entitled to prove these benefits with respect to each investor, to the extent not subject to recoupment by the government in the event of a judgment in favor of plaintiffs,[33] since these tax considerations were at the heart of the investment decisions in question.[34] In transactions such as the instant proceedings where tax considerations were paramount, no reason whatever exists to deprive petitioners of the opportunity to demonstrate, by expert evidence, the complete economic effects of the transactions upon each of the investors. Resolution of such damage issues of course can only be made by considering the totality of the circumstances applicable to each investor separately.

[32]*E.g., Turner v. Lundquist*, 377 F.2d 44 (9th Cir. 1967); *Hupp v. Gray*, 500 F.2d 993 (7th Cir. 1974); *Casualty Insurance Co. v. Rees Investment Co.*, 14 Cal.App.3d 716, 92 Cal.Rptr. 857 (1971).

[33]*See* the discussion in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 377 F.2d 776, 792-93 (3rd Cir. 1967), and the subsequent reversing opinion by this Court, 392 U.S. 481, 503 (1968).

[34]Of course, these tax considerations also are highly relevant to the motivation of each investor in investing in the first place and to whether each investor in fact relied on any of the representations made with respect to the investments.

C. The "Innovative" Order of the District Court Will Necessitate an Artificial Severance of Interrelated Issues and Compel Consideration of Each Before Different Juries.

The issues discussed in Part I.B above are vital to both plaintiffs' and defendants' cases and, indeed, constitute most of the matters at issue in these proceedings.

It is simply unimaginable for a jury in a purported "class trial" to determine rationally whether or not assorted selected writings issued with respect to unregistered and registered securities of ten oil ventures over an eight-year period were "materially misleading" because of the fault of diverse defendants and for that jury to do so in an artificially created vacuum isolated from evidence of (i) the complete presentation made to each investor, (ii) other considerations motivating the investor, (iii) the knowledge possessed by the investor, and (iv) the complete factual context in which the information was imparted to the investor.[35] It is equally unimaginable that following the rendition of such an abstract determination the fundamental issues of reliance, causation, knowledge of facts allegedly misrepresented or omitted, statutes

[35]In the context of eliminating the so-called "plain meaning rule" from the law of contracts, former California Chief Justice Traynor pointed out that interpreting a written instrument without reference to factual context would "presuppose a degree of verbal precision and stability our language has not attained." *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.*, 69 Cal.2d 33, 37, 69 Cal.Rptr. 561, 442 P.2d 641 (1968). In fact, words "do not have absolute and constant referents," and thus the "meaning of particular words or groups of words varies with the '. . . verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers . . . .'" 69 Cal.2d at 38. Exclusion of evidence of surrounding circumstances "is a remnant of a primitive faith in the inherent potency and inherent meaning of words." 69 Cal.2d at 37.

of limitations, laches, waiver, estoppel, ratification, unclean hands, and *pari delicto* could be adjudicated rationally by juries playing no role in determining whether or not the presentation to each investor was misleading.

Such radical surgery upon the substantive elements of a securities fraud claim in order to accommodate the class action procedural device should not be countenanced and plainly is constitutionally prohibited where the inevitable result is a deprivation of petitioners' Seventh Amendment right to a jury trial.

The Court of Appeals' suggestion that there is nothing in the District Court's order that would preclude the same jury that hears the class trial issues from later hearing the excluded individual issues is a victory of theory over reality. The District Court's order provides that subsequent trials on the individual issues affecting 1,700 investors will occur no sooner than 90 days after any decision in favor of the plaintiffs in the class trial.[36] If it is in fact seriously contended that one jury is to be retained to hear the class trial together with trials of the individual issues after expiration of the 90-day claim period, then the procedure is manifestly unworkable and imposes unacceptable burdens upon prospective jurors.[37]

[36]App. at A31.

[37]Particularly appropriate is the following comment of the court in *Schaffner v. Chemical Bank*, 339 F.Supp. 329 (S.D.N.Y. 1972):

> "Parenthetically, the notion of utilizing a jury trial in a class suit containing the varied problems certain to abound herein, is enough to chill any further discussion of the required superiority of a class claim over other available methods for the fair and efficient adjudication of the controversy. Such a trial, whether one trial or the multiple

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Moreover, the suggestion that a single jury could in fact constitutionally hear both the class trial and the subsequent trials of individual issues in these proceedings loses sight of the nature of the Seventh Amendment right to a unitary jury trial on inseparable and interrelated issues. Where issues are so related that each cannot be submitted to a jury independently without confusion and uncertainty which would amount to a denial of a fair trial, "separate trial, even to the same jury, would be erroneous." 9 Wright & Miller, Federal Practice & Procedure, Civil §2391, at 303-04.

Petitioners do not contend by the foregoing that issues may never be excluded from the trial of common questions in class actions but only that such an exclusion is impermissible and unconstitutional when it cannot be accomplished without an abandonment of the underlying restrictions of the Seventh Amendment. As the court in *National Auto Brokers Corp. v. General Motors Corp.*, 60 F.R.D. 476 (S.D.N.Y. 1973), recognized:

> "It is true that under Rule 23 there may be, when appropriate, a single trial of common issues and then separate trials of individual issues. See Green v. Wolf Corp., 406 F.2d 291, 301 (2d Cir. 1968), cert. den., 395 U.S. 977, 89 S.Ct. 2131, 23 L.Ed.2d 766. *But this assumes that the individual issues can be reasonably split off, and also assumes that the individual issues can be handled with some degree of expedition and efficiency.*
>
> "I am confident that neither condition exists in the present case. In this case, the so-called common issues such as conspiracy should not be tried in the abstract in the absence of the flesh-and-blood claimants to show the alleged effects of the conspiracy. * * *" [Emphasis added.] 60 F.R.D. at 491.

mini-trials probably required, would withdraw from all other usefulness for years to come the federal judicial personnel involved. Where one could muster jurors willing to devote themselves so indefinitely in time from their accustomed tasks, is puzzling. And one might relevantly ask—what public interest would be served by devoting the public's facilities in this way and what just purpose requires such a colossal marshalling of judicial resources and their supporting personnel?" 339 F.Supp. at 337. *See also* footnote 24, *supra*.

In the instant proceedings, the Court of Appeals' order sanctioning a class trial of only portions of the general liability question likewise has the inevitable effect of leaving for later trials by various juries the question of whether any defendant has specific liability to flesh and blood investors. This order directly violates this Court's pronouncement that "[o]nly one trier of fact should be used for the trial of what is essentially one lawsuit." *Fitzgerald v. United States Lines*, 374 U.S. 16, 21 (1963).

II

The Standard Adopted by the Court of Appeals for Review of the District Court Order Curtailing Petitioners' Right to a Jury Trial Conflicts With Applicable Decisions of This Court and Constitutes an Abdication of Effective Protection of an Important Constitutional Right.

Underlying the Court of Appeals' refusal to issue a writ of mandamus or other appropriate writ vacating and setting aside the District Court's erroneous class action certification order was its unduly narrow and

technical application of the traditional standards for review by mandamus.[38] While in the usual case tests for mandamus review based upon "clear and indisputable error" or "compelling circumstances" may be appropriate, this Court has made clear that a far more liberal standard is to be applied where the right to trial by jury has been circumscribed.

Thus, in *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959), this Court reversed a decision of the Ninth Circuit Court of Appeals which had denied a petition seeking a writ of mandamus to require a District Court to set aside a ruling proposing to try in equity, without a jury, issues that were also common to a legal proceeding to be tried subsequently. In so holding, this Court applied a standard of review very different from the standard applied by the Court of Appeals in the instant proceedings:

> "We granted certiorari, 356 U.S. 956, because 'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that *any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.' Dimick v. Schiedt,* 293 U. S. 474, 486." [Emphasis added.] 359 U.S. at 501.

In *Dairy Queen, Inc. v. Wood,* 369 U.S. 469 (1962), this Court recognized that its decision in *Beacon Theatres* "emphasizes the responsibility of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury . . .," 369 U.S. at 472, and this Court further recognized that even limited inroads upon the right to trial by

[38]App. at A9-A13; 549 F.2d at 691-92.

jury "'"should seldom be made, and if at all only when unusual circumstances exist."'" 369 U.S. at 478 n. 18.

Since the rendition of *Beacon Theatres* and *Dairy Queen,* the Courts of Appeals consistently have recognized that these decisions imposed a greater responsibility for review by mandamus of federal district court actions affecting a litigant's right to trial by jury than might exist in other circumstances. For example, in *Goldman, Sachs & Co. v. Edelstein,* 494 F.2d 76 (2d Cir. 1974), the Court of Appeals for the Second Circuit stated:

> "[T]he Supreme Court, in Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 511, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959), removed any doubt regarding the propriety of using mandamus to protect a litigant's right to a jury trial of issues, citing Judge Frank's decision in Bereslavsky v. Caffey, 161 F.2d 499 (2d Cir. 1947). Indeed, in its later decision in Dairy Queen v. Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962), *the Court implied that it is our duty to grant mandamus in aid of that right. . . .*" [Emphasis added.] 494 F.2d at 78.

Similarly, in *In Re Union Nacional de Trabajadores,* 502 F.2d 113 (1st Cir. 1974), *opinion withdrawn on other grounds,* 527 F.2d 602 (1975), the First Circuit Court of Appeals, after acknowledging the "exceptional circumstances" and "clear and indisputable error" standards traditionally applicable for issuance of a writ of mandamus, noted:

> "There seems to be some relaxation of this requirement when the petitioner seeks enforcement

> of a right to a jury trial. In a civil case, there is no doubt that mandamus is appropriate if a jury trial is being wrongfully denied, even, it would appear, when the decision whether such right exists is a close or complicated one." [Citations omitted.] 502 F.2d at 115-116.

To the contrary, the Court of Appeals below mistakenly applied the "clear and indisputable error" and "compelling circumstances" standards with full vigor although petitioners' rights to trial by jury were at stake.

Conclusion.

When in a jury case a district court splinters a basic unitary question of liability into a collection of "issues" and orders bifurcated trials of those issues, despite the fact that the issues are inseparable and in fact correlative parts of the basic liability question, the inevitable result is an unconstitutional deprivation of the litigants' Seventh Amendment right to a meaningful trial by jury, whether or not the same jury may be utilized throughout the bifurcated proceedings. Such an order is no less unconstitutional merely because it is rendered to facilitate the use of the class action procedural devise in complex business litigation.

The constitutional problem raised by such an order is not an isolated one but rather is recurring with ever increasing frequency as the district courts experiment with procedural devices to handle complex litigation. The Courts of Appeals, however, by adhering to self-imposed, unduly technical standards for review of this jury trial issue, have failed to confront the problem and have instead implicitly sanctioned such

experimentation without providing any guidance to the district courts concerning Seventh Amendment implications.

Unless this important constitutional problem is confronted now, and definitively, by this Court, case after case, particularly those of the greatest magnitude, will produce only fatally defective products. When this Court later corrects such results, as it eventually must, it will be too late for many litigants, including petitioners. Petitioners therefore respectfully pray that this Court grant their petition to give guidance now to the district courts and relief to those vitally affected by the order of the Court of Appeals below.

Dated: June 1, 1977.

Respectfully submitted,

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APPENDIX.

Opinion.

United States Court of Appeals, for the Ninth Circuit.

Arthur Young & Company et al., Petitioners, v. United States District Court, etc., Respondent, Albert Kaufman et al., Real Parties In Interest. No. 75-1990.

Filed March 4, 1977.

Appeal from the United States District Court for the Northern District of California.

Before BROWNING and CHOY, Circuit Judges, and LUCAS,* District Judge.

OPINION

LUCAS, District Judge:

This petition is brought pursuant to the All Writs Statute, 28 U.S.C. § 1651. It arises out of three related civil actions now pending in the Northern District of California.[1] The district judge presiding over

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*Honorable Malcolm M. Lucas, United States District Judge for the Central District of California, sitting by designation.

[1]These actions are entitled and numbered *Albert Kaufman, etc., v. John P. Burke, etc., et al.*, No. C-72-1473 WTS (hereinafter "*Kaufman*"); *Joe Ebner, etc., v. Petroleum 2000 Corporation, et al.*, C-73-0716 WTS (hereinafter "*Ebner*"); and *James Howenstine, et al. v. Petroforce Corporation, et al.*, No. C-74-0957 WTS (hereinafter "*Howenstine*"). Also pending in the district court are *Securities & Exchange Commission v. Geotek Resources Fund, Inc., et al.*, No. C-73-0819 WTS (hereinafter the "*S.E.C. action*"), and *Edmund H. Shea v. John P. Burke*, No. 73-0899 WTS (hereinafter "*Shea*"). The *S.E.C. action* seeks injunctive relief against those allegedly involved in the J. B. Venture and Geotek partnership schemes described later in this opinion, and appointment of a receiver for the Geotek partnerships and all the Burke corporations. The Shea action is a private, individual action for damages based on the J. B. Venture and Geotek partnership sales and brought under the federal securities laws. These two actions were originally scheduled to be tried in a consolidated trial with the *Ebner*, *Howenstine*, and *Kaufman* claims, but the district judge has ordered the *S.E.C.* action tried separately. These two actions are not presently before us.

the cases certified each action as a class action with respect to certain issues, reserved other issues for separate determination, and required the preparation and mailing of notices to members of the classes. Petitioners, defendants in one or more of the actions below,[2] seek a writ of mandamus, or some other appropriate writ, that would require the district court in each case, to vacate and set aside its order and strike all the class allegations from the complaint. Alternatively, they seek a writ of mandamus which would order the district court to certify its order for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b). They have also filed an appeal from the class certification order under 28 U.S.C. § 1291. The real parties in interest, the named plaintiffs below, oppose the petition and move to dismiss the appeal. We deny the petition in its entirety and dismiss the appeal.

BACKGROUND[3]

Plaintiffs in each of these actions seek damages and equitable relief for fraudulent investment schemes of which John Burke, a defendant in the actions below but not a petitioner here, allegedly was the primary creator and promoter. From 1964 through 1968, J. B. Oil Company, a corporation controlled by Burke,

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[2]The petitioners are Otis Chandler and Arthur Young & Co., Inc., defendants in all three actions, and Simon Ramo and Edmund Beckwith, defendants in *Kaufman* only. Beckwith had been named in the *Ebner* action, but was dismissed from the action by summary judgment.

[3]In certifying the classes, the district judge did not make detailed findings of fact. The statement of facts given in this opinion is derived from the allegations of the complaints and factual material submitted to the district court by the defendants in connection with the class certification motions. See *Blackie v. Barrack*, 524 F.2d 891, 900-901, n.16, 17, *cert. denied*, —U.S.—, 97 S.Ct. 57, 50 L.Ed.2d 75 (1976).

initiated the sale of interests in five oil exploration joint ventures (the "J. B. Ventures"). These interests were offered by means of written circulars and other written promotional devices, as well as through oral solicitations. In 1970, the interests of all investors in the four 1964 through 1967 J. B. Ventures were exchanged for stock in Petroleum 2000 Corporation, a corporation controlled by Burke. In 1971, the interests in the 1968 J. B. Venture were exchanged for shares in Petroforce Corporation, another Burke controlled entity. From 1969 through 1971, Geotek Resources Fund, Inc., and GTR Management (the "Geotek corporations") formed and sold interests in five limited partnerships (the "Geotek partnerships") set up to explore for both oil and gas. These partnership interests were sold pursuant to a registration statement and prospectus filed with the Securities and Exchange Commission. At all times relevant to this litigation, Burke was an officer and director of both Geotek corporations. He originally owned all the outstanding shares of GTR.

The *Ebner* action, filed February 1, 1973, is based on the sales of 1964-1967 J. B. Ventures and the exchange in 1970 of those joint venture interests for shares in Petroleum 2000. Claims are asserted under § 10(b) of the 1934 Securities and Exchange Act (15 U.S.C. § 78j(b)), and S.E.C. Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5). Plaintiff Ebner alleges that he bought an interest in the 1965 J. B. Venture and traded that interest for Petroleum 2000 shares in 1970. The certification order designates Ebner as the class representative for all those who bought interests in the 1964-1967 J. B. Ventures and all shareholders of Petroleum 2000 Corporation. This class consists of 319 investors. The complaint in *Ebner*

alleges, in essence, that misrepresentations and misleading omissions were made in offering circulars and promotional material disseminated in connection with the sales of J. B. Ventures and the Petroleum 2000 exchange.

Howenstine was filed on May 3, 1974; here again, § 10(b) and Rule 10b-5 are the grounds stated for the relief sought. The named plaintiffs are an individual investor in the 1968 J. B. Venture and an unincorporated association of five investors in that venture. The April 21, 1975 order certifies the class in this action as all those who bought interests in the 1968 J. B. Venture and all shareholders of Petroforce Corporation. There are 187 such investors. The *Howenstine* complaint alleges that materially false and misleading statements were made in advertising brochures used to solicit purchases of the 1968 J. B. Venture interests, in the Venture agreement sent to investors in the 1968 J. B. Venture, in a printed circular that tendered the Petroforce shares for the J. B. Venture interests in 1971, and in various financial statements prepared by Arthur Young & Co. in connection with the sale and operations of the venture and corporation.

The *Kaufman* action, filed August 14, 1972, arises out of the Geotek partnership sales. The complaint is based upon § 12(2) and § 17 of the 1933 Securities Act (15 U.S.C. §§ 77*l*(2), 77q), § 10(b) of the 1934 Act, and Rule 10b-5. This plaintiff now contends that his action is also proper under § 11 of the 1933 Act (15 U.S.C. § 77k), although this section was not specifically pleaded as a basis for relief.[4] Plaintiff

[4]This contention is opposed by petitioners and has been vigorously argued throughout the Rule 23 proceedings. The issue, however, has not yet been presented to the district court for formal decision. The district court class certification order did not specify the provisions of federal law under which trial in these cases is to proceed. The division of issues made by the order could be interpreted to either approve class trial of all § 11 liability issues in *Kaufman*, or to ignore the § 11 claims in their entirety. Petitioners' opposition to the class certification in *Kaufman* is premised on the nonexistence of § 11 claims in that action. Petitioners have made no argument that § 11 claims in *Kaufman* cannot be tried on a class basis in one trial if the district court concludes them to have been asserted.

Kaufman purchased interests in the first two of the five Geotek partnerships and, by the district court's certification order, represents the purchasers of interests in each of the Geotek partnerships. This class consists of 1,215 members. The *Kaufman* complaint describes petitioners Chandler and Ramo as directors of the Geotek corporations at all relevant times. Petitioner Beckwith held, and still holds, various officer positions with the corporations according to the complaint. Petitioner Arthur Young & Co. allegedly performed auditing and other accounting services for the Geotek corporations and partnerships. All the petitioners are alleged to have knowingly participated in, and aided and abetted, the conduct alleged in the complaint. The complaint sets forth materially false and misleading statements that allegedly appeared in the prospectuses issued by the corporations in connection with the sales of the partnership interests. In addition, the complaint alleges that Burke made various oral misrepresentations to plaintiff Kaufman and others regarding the Geotek partnership.[5]

[5]The claims based on possibly-divergent oral misrepresentations made by Burke and others to investors in the Geotek partnerships and J. B. Ventures complicate any consideration of class certification in these actions, because common issues presented by the various claimants on these claims may not

(This footnote is continued on next page)

In opposition to the motion to certify the classes, petitioners submitted evidence which they contend demonstrates the impropriety of the class certifications. They presented their own exhibits and affidavits, as well as responses given in discovery by named plaintiffs. The evidence which petitioners presented indicates that some interests in each of the J. B. Ventures were sold by means of oral presentations given to investors by Burke and another defendant. Petitioners contend that the other defendants, including themselves, did not participate in these solicitations. In making their investment decisions, say the petitioners, some of the investors relied on these presentations, or on the advice of others, and not on any written material. Some of these investors had personal contact with the defendants, say petitioners, but others did not. The petitioners have further shown that the investors in the J. B. Ventures were sophisticated investors with high incomes. They contend that these investors were looking for risky investment as tax write-offs, and that some members of the *Ebner* and *Howenstine* classes were dissatisfied with the Burke programs as early as 1966 and had made inquiries and complaints to various agencies some time prior to 1970.

In addition, the petitioners raise questions about special arrangements, such as finders' fees and kickbacks, which Burke had with some class members. Furthermore, petitioners note that the Geotek partnerships were also sold to high income investors through

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be as many as on the claims arising out of the written material. In an apparent attempt to allay the district court's concern about these complications, the plaintiffs withdrew all claims based on oral misrepresentations. Nevertheless, there remains the problem of defenses based on oral misrepresentations, at least in theory. See page 693 *infra*.

oral presentations; as set out in *Kaufman's* complaint, and as stated by him in deposition, he bought his Geotek interest after such a presentation. Finally, petitioners presented some evidence relating to the possible conflicts between the respective class representatives and their classes. All of this information was, of course, before the district court when it made its determination to certify the classes.

The class certification order was entered after many lengthy hearings on the class motions, extensive briefing by the parties, and serious and careful consideration of the entire matter by the district judge. An important feature of this order was that it certified certain issues for class adjudication but excluded others from the initial class trial. The order provided for certification of each action on the following terms:

> (a) As to the issues of liability of general application, excluding the following issues: reliance or causation, duty owed to the individual claimant insofar as it may vary depending upon the status of that claimant, knowledge of the claimant investor as to the facts allegedly misrepresented or omitted, statute of limitations, laches, waiver, estoppel, ratification, unclean hands and pari delicto;
>
> (b) As to the issue of damages only to the extent of determining the value of the [particular interest received by the investor], together with loss of profits, if any, within the meaning of California Civil Code Section 3343, up to the time of trial.

The order further excluded evidence of defendants' oral misrepresentations from presentation at the class

trial. The order, in addition, set the issues reserved to be determined: "Upon individual claims to be filed within ninety days of any judgment in the action in favor of the plaintiffs." It also stated that the district court retained jurisdiction to modify the order at any time, prior to a decision on the merits of the case. Class notices were ordered prepared and submitted for mailing. The motions of the defendants that the actions not be maintained as class actions were denied.

Upon receipt of the class certification order, petitioners filed a motion for certification of the order for appeal pursuant to 28 U.S.C. § 1292(b). Shortly thereafter, they noticed an appeal pursuant to 28 U.S.C. § 1291, and then filed the writ petition along with an application for a stay of the district court proceedings. After hearings in the district court, the district judge stayed mailing of the class notices and commencement of the trial for a limited time to allow review of his rulings. The district judge also denied the motion to certify the class order for interlocutory appeal, and he later severed the S.E.C. action trial from the trial of the other actions.

This court issued an order that stayed the trial and the mailing of the class notices pending disposition of the writ of mandamus. We then dismissed the petition for a writ in the *Shea* action, vacated the stay as to that case, and ordered that the remainder of the petition be set down for oral argument. We have heard argument, and the petition has been submitted for our consideration.

The petitioners argue that the district court's order effectively denies them the Seventh Amendment right to a jury trial on the issues of their liability and

the plaintiffs' damages. This is true, they assert, because the issues certified for class treatment by the district court are not so distinct and separable from the issues left for later determination that separate trials of those issues before separate juries can be held consistent with the Seventh Amendment. *See Gasoline Products v. Champlin Refinery Co.*, 283 U.S. 494, 51 S.Ct. 531, 75 L.Ed. 1188 (1931); *United Air Lines, Inc. v. Wiener*, 286 F.2d 302 (9th Cir.), *cert. denied*, 366 U.S. 924, 81 S.Ct. 1352, 6 L.Ed.2d 384 (1961). The petitioners contend that as a result of this error each of them faces the prospect of either accepting millions of dollars in liability by settlement, or going forward, after a cumbersome class trial, with a series of burdensome and virtually endless trials on issues distinctive with each claimant. They further contend that the certification order does not accord with Fed.R. Civ.P. Rule 23, and that the cases are not proper for class treatment because, "individual issues predominate, the actions as class actions are unmanageable, the class action device is not the superior method of resolving the controversies presented, and the class representatives are not adequate fairly to protect the interests of all investors."

REVIEW BY MANDAMUS

The Supreme Court has recently stated that "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. United States District Court, etc.*, 426 U.S. 394, 402, 96 S.Ct. 2119, 2124, 48 L.Ed.2d 725 (1976). In *Kerr*, the Court noted decisions that had expanded the use of mandamus beyond its traditional limited use as a means of confining a lower court to the "lawful exercise of its pre-

scribed jurisdiction" or compelling it " ' "to exercise its authority when it is its duty to do so," ' " *Id.*, 426 U.S. at 402, 96 S.Ct., at 2124, citing *Will v. United States*, 389 U.S. 90, 95, 88 S.Ct. 269, 273, 19 L.Ed.2d 305, quoting *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26, 63 S.Ct. 938, 941, 87 L.Ed. 1185 and still approved the less restricted definition of "jurisdiction" it had applied in *Will v. United States, supra. See Kerr v. United States, supra*, 426 U.S., at 402, 96 S.Ct., at 2124. Nevertheless by its opinion in *Kerr*, the Supreme Court emphasized the "extraordinary" nature of the writ, reaffirmed that only exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy,[6] and clarified the proper nature and scope of our inquiry on review by mandamus.[7] The Court said:

> "As a means of implementing the rule that the writ will issue only in extraordinary circumstances, we have set forth various conditions to

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[6]426 U.S. at 402, 96 S.Ct. at 2124.

[7]*Kerr* recognizes a petition for a writ of mandamus can put the respondent judge in the unusual and "unfortunate" position of dependence on a litigant for his defense in the Court of Appeals. *Id.*, 426 U.S. 394, at 402, 96 S.Ct., at 2124. The petition also makes the judge an adversary to a party interested in litigation pending before the judge. More important the Court went on to describe the legislatively and judicial policy against "piecemeal litigation" that underlies the treatment of the mandamus remedy as an extraordinary one. *Ibid.* The Court perceived the expanded use of the writ would have an adverse effect on the "fair and prompt administration of justice." particularly in this "era of excessively crowded lower court dockets." *Ibid.* A grant of the writ in this case would certainly have the deleterious effect of encouraging frivolous and dilatory petitions under the guise of requests for "supervision" or "advice" from the Court of Appeals on matters traditionally within the exclusive sphere of the trial court's discretion, at least until final judgment has been entered.

> its issuance. Among these are that the party seeking issuance of the writ have no other adequate means to attain the relief he desires, *Roche v. Evaporated Milk Assn.*, 319 U.S., at 26, 63 S.Ct., at 941, and that he satisfy 'the burden of showing that [his] right to issuance of the writ is "clear and indisputable." ' *Bankers Life & Cas. Co. v. Holland*, 346 U.S. [379], at 384, 74 S.Ct. [145], at 148, [98 L.Ed. 106], quoting *United States ex rel. Bernardin v. Duell*, 172 U.S. 576, 582, 19 S.Ct. 286, 287, 43 L.Ed. 559 (1899); *Will v. United States*, 389 U.S., at 96, 88 S.Ct., at 274. Moreover, it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed. *Schlagenhauf v. Holder*, 379 U.S. 104, 112 n.8, 85 S.Ct. 234, 239, 13 L.Ed.2d 152 (1964); *Parr v. United States*, 351 U.S. [513], at 520, 76 S.Ct. [912], at 917 [, 100 L. Ed. 1377]. See also *Technitrol Inc. v. McManus*, 405 F.2d 84 (CA 8), *cert. denied*, 394 U.S. 997, 89 S.Ct. 1591, 22 L.Ed.2d 775 (1969); *Pacific Car and Foundry Co. v. Pence*, 403 F.2d 949 (CA 9 1968)." 426 U.S., at 403, 96 S.Ct., at 2124-25.

The Supreme Court has thus directed us to examine, on a petition for a writ of mandamus, the degree of certainty that there was error committed by the district court and the alternative procedural means available to either correct the error or remedy the collateral harm that will flow from the error. If we determine that the error, if any, is not "clear and indisputable," or that there are alternative means available to correct

the error or remedy the harm, the writ will not issue. Where the lack of remedy for a collateral harm is asserted as the ground for issuance of a writ, moreover, the proponent of the writ must also demonstrate that the harm will, in all likelihood occur, absent the writ. Interference with the trial court's control over its own proceeding is not a matter to be undertaken lightly or on the basis of mere speculation by the parties or the reviewing court about what may occur at some future date.

Once we have determined that the district court clearly erred and that the error or the injury which it causes is not remediable by other means, we may then decide whether to exercise our discretion to issue the writ. The primary consideration in any decision to exercise that discretion is the gravity and nature of the error or harm asserted as a basis for the writ. Other significant factors may come into play, however, such as the effect of issuance of the writ on the proceedings below when viewed in light of all the circumstances of the litigation, or some public, judicial, or legislative policy that, in the particular instance weighs for or against issuance of the extraordinary writ.

For the reasons given below, we conclude the petitioners have not demonstrated with certainty that the district judge made a clear and indisputable mistake in certifying the class issues and separating certain other issues for individual adjudication. Having failed to find any error that was "clear and indisputable," we need not determine whether remedies alternative to mandamus exist or whether the gravity and nature of the harm compels us to exercise our discretion to issue the writ. We conclude, therefore, that "compelling circumstances" do not exist under the facts of this case sufficient to empower us to invoke the extraordinary remedy.[8]

LACK OF CLEAR ERROR

Fed.R.Civ.P. 42(b) provides district courts with the power to order a separate trial of any issues when such an order is "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." Fed.R.Civ.P. 23(c)(4) allows for class treatment of particular issues if such treatment is otherwise appropriate under Rule 23. Rule 23(d) provides the trial judge presiding over any class action with "extensive powers to expedite the suit with procedural innovations." *Blackie v. Barrack*, 524 F.2d 891, 907, n.22 (9 Cir. 1975) *cert. denied*, __ U.S. __, 97 S.Ct. 57, 50 L.Ed.2d 75 (1976).

Each of the rules just cited are, of course, subject to the Seventh Amendment's guarantee of the right

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[8]We perceive no conflict between our opinion and that of the Court in *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335 (9th Cir. 1976). In *Green*, the "clear and indisputable" error furnished the "compelling circumstances" necessary for the issuance of the writ. In *McDonnell Douglas Corp. v. U. S. Dist. Ct.*, 523 F.2d 1083, 1097 (9th Cir. 1975), this Circuit issued a writ of mandamus where the district court's decision constituted a "clear abuse of discretion" and the same district judge had "reached an identical decision in a prior case. . . ." We also note the *McDonnell Douglas* opinion found the district court's order was directly contrary to a recent decision of the Ninth Circuit. This amounts to adherence to the "clear error" rule we follow here. *McDonnell Douglas*, decided prior to *Kerr v. United States District Court, supra*, does not discuss the availability of other relief as required by *Kerr*, although it appears the collateral harm to be suffered by the mailing of notice to the class, a matter of primary concern in a companion decison, *Pan Am. World Airways, Inc. v. United States District Court*, 523 F.2d 1073 (9th Cir. 1975) was considered by the court in *McDonnell Douglas*.

to a jury trial in federal civil cases. The constitutional right to a jury trial has been held to require trial of all issues before one jury in some circumstances. *Gasoline Products Co. v. Champlin Refining, supra; United Air Lines, Inc. v. Wiener, supra.* The right to a unitary jury trial is not an absolute one, however, *Swofford v. B & W, Inc.*, 34 F.R.D. 15, 20 (S.D. Tex.1963), *aff'd* 336 F.2d 406 (5 Cir. 1964), *cert. denied*, 379 U.S. 962, 85 S.Ct. 653, 13 L.Ed.2d 557 (1965); *O'Donnell v. Watson Bros. Transportation Co.*, 183 F.Supp. 577 (N.D.Ill. 1960), a principle recognized by both the *Gasoline Products* and *United Air Lines* decisions. In *United Air Lines*, for example, this Circuit expressly refused to hold that such an absolute right exists, but rather stated that where the questions sought to be bifurcated were "[s]o interwoven . . . that the [one] cannot be submitted to the jury independently of the [other] without confusion and uncertainty which would amount to a denial of a fair trial . . . [citing *Gasoline Products*]," 286 F.2d, at 306, the bifurcation was unconstitutional. Furthermore, aside from any issue of trial by separate juries, there is no Seventh Amendment requirement that all evidence be presented to the trier of fact at one hearing. As stated by the Supreme Court in *Gasoline Products:*

> "All of vital significance in trial by jury is that issues of fact be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law. [Citations omitted]. Beyond this, the Seventh Amendment does not exact the retention of old forms of procedure." 283 U.S. at 498, 51 S.Ct., at 514 (1931).

The Supreme Court has not given the problem of bifurcated jury trial significant consideration since the 1931 *Gasoline Products* decision, or in the light of the 1938 adoption of the modern Federal Rules of Civil Procedure, or the 1966 amendments to Fed.R. Civ.P. 23 and 42. Nevertheless, we believe *Gasoline Products*, with its emphasis on the substance of the right to a jury trial rather than its form, speaks directly to contemporary courts faced with modern litigation of substantial complexity. As long as the form of trial adopted by the trial court "will afford opportunity for the consideration by the jury" provided at common law, there is no violation of the rights to a jury trial. *Gasoline Products Co. v. Champlin Refining Co., supra;* see also *United Air Lines, Inc. v. Wiener, supra.*

As set out at page 690 *supra*, the district court's order provides for determination of the issues excluded from the class certification and trial at the second trial to take place at least ninety days subsequent to any judgment in favor of the plaintiffs in the class trial. Assuming the first trial is heard and the class issues determined by one jury, as had been requested by the defendants, we perceive no absolute bar, constitutional or otherwise, to resolution of any remaining issues before either the same[9] or a second jury. None of the issues reserved are part of the class plaintiff's case-in-chief. Rather they represent separate defenses that may be raised to defeat the claims of certain

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[9]Petitioners characterize as "disingenuous" the suggestion that trial of all issues in these cases will be had before one jury. There is nothing in the district court order that would preclude such a procedure, as a practical matter, and we find nothing inherently wrong with such a procedure. It may be that the district court does not contemplate this procedure, but it would be presumptuous of us to assume the district court's intention in this regard.

members of the class. At present, it does not appear that these defenses will be raised to defeat the claims of all or many of the class members.[10] Furthermore, these defenses are distinct from the class issues in the cases. At this time, we cannot say, as a matter of law, that the reserved issues are so "interwoven" with the class issues that presentation of all the issues together at one hearing before one trier of fact is necessary to comport with the guarantees of the Seventh Amendment. Our conclusion that there was no "clear error" is supported by an examination of the various individual and class issues involved in this litigation.

Petitioners contend that the separate issues to be tried at the first class trial are whether misrepresentations or omissions of fact were made in connection with the J. B. Venture or Goetek partnership sales or the exchange of Petroleum 2000 or Petroforce stock, whether a particular defendant bears responsibility for any false or misleading statement so made, and whether

[10]The significance of the district court's separation of certain liability issues from the class issues for later determination is not self-evident. It may be he concluded that such issues are non-existent for all or almost all of the claims in the litigation, and he did not want to clutter trial of the bulk of the class claims with trial and discovery on the relatively few claims on which the defenses were to be raised. On the other hand, it may be he felt the issues reserved would become substantial but individual for each potential claimant. We are of the view that if the issues left for later determination are, in fact, substantial ones for all or most of the claimants, they would be amenable to class proof. See *Blackie v. Barrack, supra,* 524 F.2d, at 906-07, n.22. This would make the bifurcation unnecessary and allow for full resolution of all issues at one hearing on a class basis. Considering the record before us, we take the district court's bifurcation order to mean that he found individual issues to exist in this litigation as reserved, but not on such a large scale as to defeat the conclusion of predominance of common issues as to most of the claims. The reservation of these questions for later trial on a few claims is within the range of procedural devices allowable under Rule 23(d).

the facts misrepresented or omitted were material. The issues reserved for later determination, say the petitioners, are the claimants' reliance on the alleged misrepresentations,[11] the extent of the duty owed by the defendant to the particular claimant, the knowledge of the individual claimant about the facts allegedly misrepresented in or omitted from the statements made by defendants, and other issues concerning the conduct of each claimant that are relevant to equitable defenses raised by defendants, such as waiver, estoppel, and laches, or to a defense based on the statute of limitations. Certain damage issues also will remain.

We find nothing prejudicial about the reservation of the reliance issue. In cases where the securities fraud is accomplished primarily by not telling potential investors some fact that would effect the reasonable investment decisions of investors, there is no need to prove actual reliance on the omission by any claimant who acted differently than would a reasonable investor possessed of the withheld information. *Affiliated Ute Citizens of Utah v. United States,* 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972); *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970); *Little v. First California Co.,* 532 F.2d 1302 (9th Cir. 1976); *Blackie v. Barrack, supra.* The plaintiffs' allegations in each of these actions concern, in large part, defendants' misleading omissions. For example, information about Burke's

[11]We do not interpret the district court's reservation of the "reliance or causation" issues as more than a recognition that reliance can be an element of the proof on the issue of "causation" in Rule 10b-5 cases. *Affiliated Ute Citizens v. United States,* 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972); *Blackie v. Barrack, supra.* The petitioners do not contend that the trial judge reserved any item relevant to causation other than reliance for later determination.

background and his mishandling of funds was allegedly never revealed to any of the investors, and plaintiffs assert that, the true relationship of petitioner Chandler to Burke's sales programs was concealed. We are of the view the primary causation issues for most of the claims here will be the materiality of those omissions. The district court has determined that to be a class issue for each of the cases, and the defendants do not dispute that finding by the district court.

This Circuit has also expanded the *Affiliated Ute* equation of materiality and causation to include those cases involving misrepresentations that inflate the price of stock traded on the open market. *Blackie v. Barrack, supra,* 524 F.2d, at 906. The reason this proof requirement was eliminated was the "unreasonable and irrelevant evidentiary burden" it imposes on plaintiffs in Rule 10b-5 private damage actions arising out of open market frauds. *Ibid.* In *Blackie,* this Court recognized investors make their decisions based on a variety of factors, often unrelated in any direct manner to specific statements made to them about the investment by those with actual knowledge about the investment. *Id.,* at 907. The *Blackie* opinion also pointed out the indirect causal relationship between any fraud perpetrated with respect to a particular open-market issue and the purchase of the security by the purchaser. *Ibid.* We find the *Kaufman* allegations are analogous to the *Blackie* case with respect to the plaintiffs' need to prove causation through proof of reliance. The Geotek partnerships were sold pursuant to registration statements and prospectuses filed with the S.E.C. The standardized statements appearing in the prospectuses were sent or shown to every investor in the Geotek partnerships. Just as the open market purchaser relies on

the integrity of the market and the price of the security traded on the open market to reflect the true value of securities in which he invests, so the purchaser of an original issue security relies, at least indirectly, on the integrity of the regulatory process and the truth of any representations made to the appropriate agencies and the investors at the time of the original issue. In *Kaufman,* the largest of these class actions, therefore, we perceive no requirements that plaintiffs prove actual reliance on the false and misleading statements alleged in order to establish the liability of any wrongdoing defendant to them.

There are separate problems with respect to the right of the defendants to disprove causation in *Kaufman* or the other cases.[12] *Blackie* states that the defendants in cases where causation is proved inferentially through materiality of the relevant misstatements may disprove the causal relationship between defendants' wrongful conduct and the plaintiffs' decision to invest. The defendants in the cases now before us, at least those, such as petitioners, who did not take part in the oral solicitation program, may try to disprove reliance on the omissions or written misrepresentations by a showing that plaintiffs actually relied on the oral presentations to the exclusion of reliance on omissions or written misrepresentations. These issues may be amenable to class proof, see note 10, *supra,* but, in any event, the defendants have relied on isolated instances of alleged non-reliance by certain claimants, coupled with the existence of the oral programs, to show they will expend substantial amounts of court and jury time to disprove reliance.

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[12]The plaintiffs base their claims in *Ebner* and *Howenstine* only on omissions allegedly made by the defendants in connection with the relevant transactions. We do not discuss, therefore, the problems these plaintiffs would face if they tried to prove those claims on a class basis.

We find these instances of questionable evidentiary significance for purposes of making a Rule 23 determination. We do not think the petitioners have yet demonstrated that the proof of non-reliance which they expect to submit at the later trial is of such volume as to be significant to the district court's determination on the Rule 23 issues, or this court's resolution of the petition.

Another issue left for later individual determination by the district court's certification order was the question of the relationship of each of the defendants to each of the plaintiffs, and the duty owed by the particular defendant to the particular claimant. That this issue was a major one in the cases arose from the Ninth Circuit's decision in *White v. Abrams,* 495 F.2d 724, (9 Cir. 1975). That case established the "flexible duty standard" for determining the liability of a particular defendant to a particular plaintiff under § 10(b) and Rule 10(b)-5. The holding in *White v. Abrams* was predicated, in part, on the assumption that negligent conduct by a party could, in some circumstances, establish his liability in a punitive damage action under Rule 10b-5. *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976) eliminates negligence, however, from the law of Rule 10b-5 private damage actions, *Id.,* 425 U.S. 193-194, 96 S.Ct. at 1381.[13] The validity of the *White v. Abrams* "flexible duty standard" must, therefore, be seriously questioned.

[13]*Ernst & Ernst v. Hochfelder* may have significant impact on the substance of the plaintiffs' claims in this litigation. Upon remand, we expect that one of the first orders of business for the district court will be to make a determination of the validity of the claims against petitioners and other defendants under the principles of *Ernst & Ernst v. Hochfelder.* We express no opinion on the merits of plaintiffs' claims under *Ernst & Ernst v. Hochfelder.*

Although "reckless" conduct may still provide a grounds for recovery under Rule 10b-5 by private plaintiffs, *see Ernst & Ernst v. Hochfelder,* 425 U.S. at 193-194, n.12, 96 S.Ct. at 1381, variations in the relationship between the defendants and the plaintiffs are simply not as important in a Rule 10b-5 action under *Ernst & Ernst* as they were under *White v. Abrams.* Although issues concerning variations in the duty owed to particular claimants were reserved for individual treatment by the district court, we conclude that those issues are no longer of substantial independent significance.

Another issue reserved for later determination by the district court's order concerns the amount of information which any particular claimant had or learned about the J. B. Ventures, the Geotek partnerships, or any of the related corporations, either at the time of the purchase of interests or at some later date prior to the time the fraud perpetrated by Burke and others was disclosed to the public. Evidence of such knowledge, say the petitioners, in [sic] relevant to their basic defenses of non-reliance, and to such other defenses as waiver, estoppel, laches, and statute of limitations. To the extent these issues are not common to the classes, see note 10, *supra,* we do not think the district judge erred simply by separating them out for individual adjudication at the close of the class trial. The petitioners have again failed to demonstrate that the existence of this issue is so prevalent among the claimants that they will present much proof on the issue at the later trial. Absent such a showing, we deem it entirely appropriate for the district judge to separate out those issues for later adjudication with respect to the relatively few claims to which they are pertinent. We view this as one of the "procedural innovations

contemplated by the Ninth Circuit in *Blackie v. Barrack, supra,* and by Rule 23(d) itself. It does not deny any party its constitutional rights with respect to those claimants against whom there will be no attempt to prove knowledge of the fraud. With respect to claimants petitioners contend did have such knowledge, we see no reason why these issues cannot be tried in an expeditious and fair way on a separate basis. As stated above, note 10, it is apparent that the district court found the claims of most of the class members amenable to class resolution, but also found there were individual issues extant that had to be tried, if at all, on an individual basis. The district court concluded that the limited existence of these issues was not significant enough, however, to deny class treatment to most of the claims in this litigation. We conclude that this finding was entirely justified by the record before that court and before us on appeal.

We again rely on *Blackie v. Barrack, supra,* to dismiss petitioners' contention that the reservation of some damage-related issues for resolution subsequent to the class trial was error. We reach this result not because the individual and reserved issues do not appear real as they concern damages suffered by the class members, but because these damage issues do not, as a rule, defeat class certification in cases such as these, and because separation of a trial on damage issues does not contravene the Seventh Amendment in this case.

As stated in *Blackie,* 524 F.2d, at 905:

> "The amount of damages is invariably an individual question and does not defeat class action

> treatment, *E.g., U.S. Financial Securities Litigation,* [64 F.R.D. 443 (S.D.Cal.1974)] at 448 n.5, and cases there cited. Moreover, in this situation we are confident that should the class prevail the amount of price inflation during the period can be charted and the process of computing individual damages will be virtually a mechanical task. [citation omitted]."

It appears to us that after class trial on the primary damage issues in this case as provided by the district court's order, all that will remain is to determine the amount invested and the interest bought by each claimant, then compute damages for each claimant. We find no substantial ground for distinction between *Blackie* and our cases on this issue.

We also conclude that separation of the trial on individual damage issues from the class trial in this securities fraud class action is not a novel procedure, nor in contravention of the Seventh Amendment. Bifurcation of the trial of liability and damage issues is well within the scope of a trial court's discretion under Fed.R.Civ.P. 42(b). *Crummett v. Corbin,* 475 F.2d 816, 817 (6th Cir. 1973); *Idzojtic v. Pennsylvania Railroad Company,* 456 F.2d 1228, 1230 (3d Cir. 1972); *Moss v. Associated Transport Inc.,* 344 F.2d 23 (6th Cir. 1965). The separation of the trial on the damage issues from the class trial will, in these cases, serve the ends of "economy and expedition." As the district court stated *In Re Memorex Security Cases,* 61 F.R.D. 88, 103 (N.D.Cal.1973):

> "While the court looks with concern upon the prospect of burdening a jury with the task of analyzing the damages to each class member even

> with the assistance of a master, it must be kept in mind that that task need not be assumed until the issue of liability is resolved in favor of the plaintiffs. [citations omitted]."

In cases of the magnitude of these, we find it permissible to separate the individual damage issues from trial of the class issues, particularly where, as here, the damage issues reserved are a discrete aspect of the case as a whole.

It is a novel and innovative step which the district judge has taken here. If his judgment proves sound, it is a step which may result in a significant advance in methods available to courts to save time and money for litigants and judges, not only in these law suits, but also in other complex litigation where the trial judge and counsel for the parties may find the path to resolution easier because traveled before. Neither the courts nor the bar have extensive experience with actual trial of these complex cases, and, as set out in note 22 to the opinion in *Blackie v. Barrack, supra,* 524 F.2d at 906-07, this Court of Appeals has committed the resolution of many management problems that arise in such cases to the sound discretion and experience of the district judge. We refuse to hold that the steps taken by the trial judge here are error, therefore, particularly prior to the time, if ever, that the harm done by the order to the rights asserted by the petitioners becomes manifest in the record of these cases and the experience of the parties below.

OTHER RELIEF SOUGHT

In the discussion above, we have set out the reasons for our denial of the petition for a writ of mandamus.[14] As noted at page two of this opinion, petitioners have sought an alternative writ to compel certification of the class order for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b) and have also filed an appeal pursuant to 28 U.S.C. § 1291. We dismiss the appeal filed pursuant to 28 U.S.C. § 1291. This dismissal is based on *Blackie v. Barrack, supra. Blackie* held that interlocutory orders granting class certification are not appealable in this Circuit pursuant to 28 U.S.C. § 1291 until final judgment. We perceive no reason to reconsider that holding or apply a different rule to the cases now before us.

The request for a writ to compel certification of the interlocutory appeal presents a question which is relatively new to this Circuit. It is a question which was recently passed upon by this Circuit in the case of *Green v. Occidental Petroleum Corporation,* 541 F.2d 1335 (9th Cir. 1976). By 28 U.S.C. § 1292(b), Congress provided a means by which, in appropriate circumstances and to further economy of litigation, full appellate review of important questions can be had prior to final judgment. By its terms, this narrow

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[14]The petitioners have asked also for a writ of prohibition or other writ. They have made no arguments for the issuance of such writs besides those made for the mandamus writ. We find no reason to decide any alternative writ would be any more appropriate than a writ of mandamus in this case, and, therefore, deny this alternative request for relief.

exception to the finality rule can not be invoked until the district judge makes a determination that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . ." 28 U.S.C. § 1292(b). Thereafter, the Court of Appeals is vested with discretion to permit the appeal. The district judge did not make such a determination here. We hold that mandamus to direct the district judge to exercise his discretion to certify the question is not an appropriate remedy, *Green v. Occidental Petroleum Corporation,* 541 F.2d 1335 (9th Cir. 1976); *Plum Tree, Inc. v. Stockment,* 488 F.2d 754, 755 n.1 (3d Cir. 1973); *United States v. 687.30 Acres,* 451 F.2d 667, 670 (8 Cir. 1971), *cert. den.,* 405 U.S. 1026, 92 S.Ct. 1291, 31 L.Ed.2d 486 (1972); *D'Ippolito v. Cities Serv. Co.,* 374 F.2d 643, 649 (2 Cir. 1967).[15] As long as the district judge is not of the opinion that the order for which review is sought meets the criteria of 28 U.S.C. § 1292(b), it is within his power to deny the motion for certification of the appeal. The petitioner's request for a writ to compel the certification of an interlocutory appeal, therefore, is denied.

In accordance with the discussion above, we deny all relief sought by the petitioners, and dismiss the

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[15]*Cf.* Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b) (1975),* 88 Harv.L.Rev. 607, 616-17.

appeal petitioners have filed pursuant to 28 U.S.C. § 1291. Accordingly, there is no basis for continuing the stay previously entered in these proceedings by this Court. We vacate the stay, therefore, and remand the cases to the district court for further proceedings.

IT IS SO ORDERED.

Order Certifying the Kaufman, Ebner and Howenstine Actions as Class Actions, Approving the Form and Content of the Proposed Class Action Notices, and Directing the Manner and Time of Mailing the Class Action Notices to All Class Members.

United States District Court, Northern District of California.

Securities and Exchange Commission, Plaintiff, v. Geotek Resources Fund, Inc., et al., Defendants. No. 73-0819 WTS.

Albert A. Kaufman, etc., et al., Plaintiffs, v. John P. Burke, etc., et al., Defendants. No. 72-1473 WTS.

Joe Ebner, etc., et al., Plaintiffs, v. Petroleum 2000 Corporation, et al., Defendants. No. 73-0176 WTS.

Edmund H. Shea, Jr., Plaintiff, v. John P. Burke, et al., Defendants. No. 73-0899 WTS.

James Howenstine etc., et al., Plaintiffs, v. Petroforce Corporation, et al., Defendants. No. 74-0957 WTS.

Filed: April 21, 1975.

The motions of the plaintiffs in the *Kaufman, Ebner* and *Howenstine* actions for an order certifying said actions as class actions and approving the proposed class action notices came on for hearing before the Court on Monday, February 3, 1975.

The Court has considered the briefs, the oral arguments, the affidavits and the other papers submitted by the parties in support of, and in opposition to, the plaintiffs' motions; and the Court has further considered the briefs, the oral arguments, the affidavits and the other papers submitted by the parties in support of, and in opposition to, the motions of defendants Otis Chandler and Arthur Young & Company for

a determination that the *Kaufman, Ebner* and *Howenstine* actions may not be maintained as class actions.

The Court has carefully reviewed and considered the foregoing matters, together with the entire record in the above-captioned consolidated actions, and based upon such review and consideration the Court finds that in the *Kaufman, Ebner* and *Howenstine* actions, and each of them, (a) the class is so numerous that joinder of all members is impracticable; (b) there are questions of law and fact common to the class; (c) the claims of the named plaintiffs are typical of the claims of the class; (d) the named plaintiffs will fairly and adequately protect the interests of the class; (e) the questions of law and fact common to the class predominate over any questions affecting only individual members; and (f) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Accordingly:

A. IT IS HEREBY ORDERED, pursuant to Rules 23(c)(1) and 23(c)(4)(a) of the Federal Rules of Civil Procedure:

1. The action entitled *Albert A. Kaufman v. John P. Burke, etc., et al.*, No. 72-1473 WTS, shall be maintained as a class action on behalf of all purchasers of interests in the GeoTek Resources Fund 1969-1, 1970-1, 1970-2, 1971-1 and 1971-2 Limited Partnerships as to certain issues only:

(a) As to issues of liability of general application, excluding the following issues: reliance or causation, duty owed to the individual claimant insofar as it may vary depending upon the status of that claimant, knowledge of the claimant investor as to facts allegedly misrepresented or omitted,

statute of limitations, laches, waiver, estoppel, ratification, unclean hands and pari delicto;

(b) As to the issue of damages only to the extent of determining the value of the limited partnership interests received by investors therein, together with loss of profits, if any, within the meaning of California Civil Code Section 3343, up to the time of trial.

As to the named plaintiff, however, the action will include all issues, both common and individual.

2. The action entitled *Joe Ebner v. Petroleum 2000 Corporation, et al.*, No. 73-0176 WTS, shall be maintained as a class action on behalf of all former co-owners of the J. B. Oil Company 1964, 1965, 1966 and 1967 Oil Exploration Programs, and all shareholders of Petroleum 2000 Corporation as to certain issues only:

(a) As to issues of liability of general application, excluding the following issues: reliance or causation, duty owed to the individual claimant insofar as it may vary depending upon the status of that claimant, knowledge of the claimant investor as to facts allegedly misrepresented or omitted, statute of limitations, laches, waiver, estoppel, ratification, unclean hands and pari delicto;

(b) As to the issue of damages only to the extent of determining the value of the interests received by investors, together with loss of profits, if any, within the meaning of California Civil Code Section 3343, up to the time of trial.

As to the named plaintiff, however, the action will include all issues, both common and individual.

3. The action entitled *James Howenstine v. Petroforce Corporation, et al.*, No. 74-0957 WTS, shall be maintained as a class action on behalf of all former co-owners of the J. B. Oil Company 1968 Oil Exploration Program and all shareholders of Petroforce Corporation as to certain issues only:

(a) As to issues of liability of general application, excluding the following issues: reliance or causation, duty owed to the individual claimant insofar as it may vary depending upon the status of that claimant, knowledge of the claimant investor as to facts allegedly misrepresented or omitted, statute of limitations, laches, waiver, estoppel, ratification, unclean hands and pari delicto;

(b) As to the issue of damages only to the extent of determining the value of the interests received by investors, together with loss of profits, if any, within the meaning of California Civil Code Section 3343, up to the time of trial.

As to the named plaintiff, however, the action will include all issues, both common and individual.

4. In reserving issues for later determination, the Court does not intend to rule upon either the legal or factual sufficiency or necessity of such issues.

5. Evidence of alleged oral misrepresentations by any of the defendants is to be excluded.

6. As to all issues excluded from class action maintenance herein, said excluded issues will be reserved for future determination upon individual claims filed hereunder by any member of the classes as above set forth, such claims to be made within 90 days after notice to such class members of the decree or

judgment herein, if such decree or judgment is in favor of plaintiffs.

7. The motions of defendants Otis Chandler and Arthur Young & Company, for orders determining that the *Kaufman, Ebner* and *Howenstine* actions may not be maintained as class actions, are hereby denied.

8. The Court retains jurisdiction of this action to correct, modify, annul, vacate and supplement this order determining the actions to be class actions from time to time before the decision on the merits.

B. IT IS FURTHER ORDERED, pursuant to Rules 23(c)(2) and 23(d)(5) of the Federal Rules of Civil Procedure:

1. That each of the proposed Notices of Pendency of Class Action, attached hereto as Exhibits A (*Kaufman* notice), B (*Ebner* notice) and C (*Howenstine* notice), and incorporated herein, is hereby approved as to form and content;

2. That on or before April 28, 1975, counsel for the named plaintiffs in the *Kaufman, Ebner* and *Howenstine* actions shall cause to be professionally printed, at the named plaintiffs' expense, sufficient numbers of each Notice of Pendency of Class Action to be mailed to all members of the three respective classes, and shall make said printed Notices available for inspection by the Court and by counsel for all parties;

3. That on or before April 28, 1975, the Temporary Receiver shall make available to counsel for the named plaintiffs in the *Kaufman* action a complete list of the names and current mailing addresses of all members of the class in the *Kaufman* action, and counsel for Petroleum 2000 Corporation and Petroforce Corporation shall make available to counsel for the named plaintiffs in the *Ebner* and *Howenstine* actions complete lists of the names and current mailing addresses of all members of the classes in the *Ebner* and *Howenstine* actions;

4. That on or before April 28, 1975, the Clerk of the Court shall make available to counsel for the named plaintiffs in the *Kaufman, Ebner* and *Howenstine* actions, at the named plaintiffs' expense, a sufficient number of envelopes bearing the printed return address of the Clerk of the Court, for use in mailing the Notices Of Pendency Of Class Action to the class members;

5. That beginning on Thursday, May 1, 1975, and finishing as soon as reasonably practicable thereafter, counsel for the named plaintiffs in the *Kaufman, Ebner* and *Howenstine* actions shall, at the named plaintiffs' expense, cause to be mailed to each member of the three respective classes, by first-class mail with postage prepaid, in an envelope bearing the printed return address of the Clerk of the Court, the appropriate printed Notice Of Pendency Of Class Action;

6. That on Friday, May 9, 1975, counsel for the named plaintiffs in the *Kaufman, Ebner* and *Howenstine* actions shall file with the Court and serve a written certificate showing the dates on which, and the persons to whom, the Notices Of Pendency Of Class Action were mailed; and

7. That on Monday, June 9, 1975, the Clerk of the Court shall file the Exclusion Requests and shall render a written report to the undersigned regarding the number of Exclusion Requests received by the Clerk from persons to whom the Notices Of Pendency Of Class Action were mailed.

C. IT IS FURTHER ORDERED that part "B" of this Order shall be subject to modification at any time, for good cause shown, upon a properly noticed motion of any party to the above-captioned consolidated actions.

D. IT IS FURTHER ORDERED that neither the named plaintiffs nor their counsel, nor the defendants nor their counsel, shall have discussions or communications concerning the class actions with any member of the three classes in the absence of court approval; provided that nothing in this paragraph shall be construed to prohibit discussions between any attorneys.

DATED: April 11th, 1975.

/s/ William T. Sweigert
WILLIAM T. SWEIGERT
UNITED STATES DISTRICT JUDGE

Supreme Court, U. S.
FILED
AUG 5 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1709

ARTHUR YOUNG & COMPANY and OTIS CHANDLER,
Petitioners,

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, HONORABLE WILLIAM T. SWEIGERT, UNITED STATES SENIOR JUDGE PRESIDING; ALBERT A. KAUFMAN; JOE EBNER; JAMES HOWENSTINE; and THE 5-H INVESTMENT CLUB,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1709

ARTHUR YOUNG & COMPANY and OTIS CHANDLER,
Petitioners,

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, HONORABLE WILLIAM T. SWEIGERT, UNITED STATES SENIOR JUDGE PRESIDING; ALBERT A. KAUFMAN; JOE EBNER; JAMES HOWENSTINE; and THE 5-H INVESTMENT CLUB,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

The petitioners, Arthur Young & Company ("Arthur Young") and Otis Chandler ("Chandler") seek review of an order entered on March 4, 1977, pursuant to the unanimous decision of the United States Court of Appeals for the Ninth Circuit. That order denied petitioners' petition for a writ of mandamus

or prohibition, which sought to set aside an order certifying as class actions three closely related securities fraud actions. The class action certification order was entered on April 21, 1975, by the United States District Court for the Northern District of California.

Petitioners now claim that the class action order violates their Seventh Amendment right to a jury trial. This is the basis upon which the petitioners seek review of the District Court's class action certification order, and of the decision of the Court of Appeals upholding that order.

Respondent respectfully request that the petition be denied. The petition contains nothing which could possibly merit the Court's review of the class action certification order. The petitioners portray the class action order as a radical and unusual departure from the normal order entered in class action securities cases. On the contrary, the class action order is as sound, practicable, and time tested as any class action order is ever likely to be. Indeed, if petitioners' arguments were to be accepted here, Rule 23 of the Federal Rules of Civil Procedure would cease to exist except on paper.

Petitioners argue that the substantive law and the Seventh Amendment right to a trial by jury should not be "twisted" to comport with Rule 23. Respondents agree, although we strenuously disagree that any of petitioners' rights have been abrogated. On the other hand, it is also imperative that the Seventh Amendment right to a jury trial not be "twisted" and

tortured, as petitioners have done here, in a desperate attempt to avoid the class certification order.

OPINIONS BELOW

The unanimous opinion and order of the United States Court of Appeals for the Ninth Circuit is reported at 549 F.2d 686. The class action certification order entered by the United States District Court for the Northern District of California, not reported, appears in the appendix attached to the petition at pages A28 through A32.

JURISDICTION

Petitioners have invoked the provisions of 28 U.S.C. § 1254(1) in asserting jurisdiction.

QUESTION PRESENTED

Whether petitioners' convoluted and untenable interpretation of the Seventh Amendment right to a jury trial is adequate reason for this Court to review the class action certification order, which is interlocutory and by its terms subject to modification by the District Court as the litigation progresses, and which complies in all respects with Rule 23 as interpreted by this Court, by the District Court and by the Court of Appeals.

STATUTORY PROVISIONS

Respondents will discuss where applicable the constitutional and statutory provisions which petitioners invoke in their petition. These provisions are the Seventh Amendment to the United States Constitution, the Rules Enabling Act, 28 U.S.C. § 2072, and Rule 23, Rule 38(a), and Rule 42(h) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

The petition relates to three separate but closely related securities fraud class actions. These actions are presently pending before the United States District Court for the Northern District of California. They have been consolidated for trial and have been certified as class actions. In each of the three suits, the plaintiffs charge defendants with violations of the federal securities law. The petitioners here are two of the defendants in those three actions. The plaintiffs in each of the three actions all purchased interests in oil and gas ventures. The three named plaintiffs and class representatives are Joe Ebner, James Howenstine, and Albert Kaufman, the real parties in interest and respondents to the petition. A brief description of each of the three cases is as follows below:

1. The Kaufman Action

The complaint in the *Kaufman* case was filed on August 14, 1972. Plaintiff Albert A. Kaufman brought the action on behalf of himself and all investors (a

class of approximately 1,215) who purchased interests in the GeoTek limited partnership oil and gas programs, against the corporations which sold the limited partnership interests, certain officers and directors of the corporations, and the corporations' independent outside creditors. Otis Chandler, one of the corporation's directors, and Arthur Young & Company, independent auditors for the corporation, were named in the complaint as defendants, and continue to remain as defendants in the *Kaufman* action.

The class members purchased interests in five separate GeoTek limited partnerships, each named for the year in which it was created:

GeoTek Resources Fund 1969-1, Ltd.
" " " 1970-1, "
" " " 1970-2, "
" " " 1971-1, "
" " " 1971-2, "

Participating interests in each of the GeoTek limited partnerships were sold pursuant to a registration statement filed in April, 1969 with the Securities and Exchange Commission, and declared effective on September 15, 1969.

The *Kaufman* plaintiffs charge that the GeoTek registration statement and prospectus, as periodically amended, contained material misstatements and omissions, and that the defendants are liable therefor under Sections 11, 12(2) and 17(a) of the Securities Act of 1933 (15 U.S.C. §§ 77k, 77(12) and 77q(a)), and Section 10(b) of the Securities Exchange Act of

1934 (15 U.S.C. § 78j(b)), and SEC Rule 10b-5 thereunder. While the *Kaufman* complaint also pleads claims for violations of the California Corporate Securities Law and common law fraud, plaintiffs have withdrawn these claims. The complaint also alleges certain oral misrepresentations. These allegations have likewise been withdrawn. Accordingly, the class action trial will be limited to the allegations of material misstatements and omissions in the GeoTek registration statement and prospectus, as amended.

2. The Ebner Action

The *Ebner* action was filed on February 1, 1973, and was brought on behalf of plaintiff Ebner and all other investors in one or more of four joint ventures known as the J. B. Oil Company 1964, 1965, 1966 and 1967 Oil Exploration Programs. A total of 319 persons invested in these four programs. Each investor received a standardized printed offering circular, signed a standard-form Oil Exploration Program Agreement, and received certain financial statements certified by petitioner Arthur Young, the independent outside auditor for the programs.

In the fall of 1969, Petroleum 2000 Corporation made an offer to all investors in the J. B. 1964 through 1967 Programs to exchange shares of its common stock for the investors' participation interests in the programs. This exchange offer was made by a printed offering circular distributed to all the investors. The requisite number of investors accepted the offer, and from early 1970 to the present, the members

of the *Ebner* class have been shareholders of Petroleum 2000 Corporation.

The *Ebner* complaint charges seven defendants, including petitioner Arthur Young and petitioner Chandler, with material misrepresentations and omissions in the J. B. Oil Program offering circulars, program agreements and financial statements, and in the offering circular distributed in connection with the Petroleum 2000 Corporation exchange offer. The *Ebner* action is based on Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. Although certain oral misrepresentations are alleged in the complaint, these allegations have been withdrawn by the plaintiffs.

3. The Howenstine Action

The *Howenstine* action was filed on May 3, 1974. Plaintiffs James Howenstine and The 5-H Investment Club (an unincorporated association) brought the action in behalf of themselves and all other investors in a joint venture known as the J. B. Oil Company 1968 Oil Exploration Program. A total of 187 persons invested in the 1968 Program. Each investor received a standardized printed offering circular, signed a standard-form Oil Exploration Program Agreement, and received a financial statement certified by Arthur Young, the independent outside auditor for the program.

In the fall of 1970 Petroforce Corporation made an offer to all investors in the J. B. 1968 Program to exchange shares of its common stock for the investors'

participation interests in the program. The exchange offer was made by a printed circular distributed to all the investors. The requisite number of investors accepted the offer, and from early 1971 to the present, the members of the *Howenstine* class have been shareholders of Petroforce Corporation.

The *Howenstine* complaint charges eight defendants, including petitioner Arthur Young and petitioner Chandler, with material misrepresentations and omissions in the J. B. 1968 Program offering circular, the program agreement, the Arthur Young & Company financial statement, and in the offering circular distributed in connection with the Petroforce Corporation exchange offer, in violation of Section 10(b) of the Securities Exchange Act of 1934, and SEC Rule 10b-5. No oral misrepresentations are alleged in the *Howenstine* complaint.

In the District Court, plaintiffs moved for an order, pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, certifying as class actions the *Ebner, Howenstine,* and *Kaufman* actions. Defendants, including the petitioners here, raised every conceivable argument in their vigorous opposition to class certification.

Few class action motions have been so thoroughly scrutinized by any court. The parties submitted voluminous briefs and substantial evidenciary materials in support of their positions. On at least three separate occasions, lengthy hearings were held before the District Court, during which the parties had a full opportunity to present evidence and argument.

On April 21, 1975 the District Court entered its order certifying the *Ebner, Howenstine* and *Kaufman* actions as class actions. Petitioners immediately filed a petition for a writ of mandamus with the United States Court of Appeals for the Ninth Circuit, seeking to vacate and set aside the District Court's class action certification order. While the petition was pending before the Court of Appeals, that tribunal issued an order staying all proceedings before the District Court.

In the Court of Appeals, all parties were once again given a full opportunity to brief and orally argue their positions. On March 4, 1977, the Court of Appeals denied the petition, vacated the stay, and remanded the *Ebner, Howenstine* and *Kaufman* actions to the District Court for further proceedings.

Upon remand, some of the parties brought motions for summary judgment in each of the three class actions. These motions have been argued, and have been taken under submission by the District Court. No date has been set for trial in any of the three actions. Nor have any class notices been mailed.

By means of the present petition, petitioners once again seek interlocutory review of a class action order already scrutinized and re-scrutinized by the District Court and by the Court of Appeals.

We respectfully request that this Court now refuse any further review of the class action certification order entered by the District Court. The order has already withstood intense judicial analysis by two Courts. It is simply contrary to all notions of judi-

cial efficiency to now apply, while the three cases are at an interlocutory stage, a third tribunal's analysis to an already microscopically examined class action certification order. Most importantly, the class action order is entirely appropriate and does not abrogate any of petitioners' rights, Petitioners' argument to the contrary should be rejected.

ARGUMENT

THE CONTROVERSY HERE IS NOT RIPE FOR REVIEW BY THE SUPREME COURT

Judicial efficiency and the need for prompt disposition of these cases in the District Court strongly militates against granting the petition for a writ of certiorari. Indeed, Rule 20 of the Rules of the Supreme Court of the United States compels a denial of review of the class action certification order at this time.

The *Ebner, Howenstine* and *Kaufman* actions are still pending before the District Court. Judgment has not been entered in any of these cases. In fact, no trial date has even been set in any of the three cases. Yet the petitioners now request this Court to bypass the normal appellate procedure.

Rule 20 precludes petitioners from "short-cutting" the normal appellate procedure, unless they can demonstrate ". . . that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settle-

ment in this court . . ."[1] Rule 20 of Rules of the Supreme Court of the United States.

Respondents respectfully submit that the petitioners have fallen far short of making the showing a need for immediate review by this Court. Indeed, the issue here is simply the propriety of an ordinary, interlocutory class action order entered by a District Court pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. Although petitioners have exerted herculean efforts in an attempt to inject constitutional issues into the certification of the class action order, the fact remains that the issue here on appeal is not of "such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court." If petitioners are now permitted to bypass the normal appellate procedure, this Court's docket may well become inundated with premature appeals alleging purported "Seventh Amendment issues" each time a District Court certifies a case as a class action.

The cases in which this Court has permitted an appeal, before judgment is given in the Court of Appeals, are clearly and unmistakably ones of "imperative public importance". *E.g.,* See *United States v. Nixon,* 418 U.S. 683 (1974), and *New Haven Inclu-*

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[1]We recognize that Rule 20 literally speaks to cases "pending in a court of appeals". However, the principle underlying the Rule should apply with at least equal force to cases still pending before the District Court. The policy upon which Rule 20 is based is to foster judicial efficiency and expediency, and to insure that the court dockets are not clogged with interlocutory appeals. These salutary considerations are undeniably present in the instant case.

sion Cases, 399 U.S. 392 (1970). In both of these cases, there were issues so important to the entire nation as to transcend the otherwise strict policy of rejecting premature appeals. In the *Nixon* case, for example, the Supreme Court granted certiorari before judgment in a criminal case in which seven indictments had been returned against members of the executive branch of the government and the Committee for the Re-election of the President, and in which the President of the United States had been named as an unindicted co-conspirator. In such a case, there is an obvious and urgent need for immediate review by the Supreme Court. In *Nixon,* the normal functioning of the executive branch of the government—clearly of imperative importance to the entire nation—depended upon a speedy disposition of the issues raised in the petition for certiorari made to the Supreme Court.

Here, no such factors exist to compel interference with the normal appellate procedure. The propriety of the class action order certifying the *Ebner, Howenstine,* and *Kaufman* actions, is not a burning issue of "imperative public importance" which cries out for immediate disposition by this Court. In fact, the issues presented in the petition are of imperative importance primarily to the petitioners, and to no one else. The petition does nothing to show otherwise.

This Court has long refused to grant certiorari over interlocutory orders. Except in extraordinary circumstances, only a final decree will be reviewed by the Court:

> "Whether an interlocutory order may be separately reviewed by the appellate court in the progress of the suit, or only after and together with the final decree, is matter of procedure rather than of substantial right; and many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters. Clearly, therefore, this court should not issue a writ of certiorari to review a decree of the circuit court of appeals or appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & K. W. R. Co.,* 148 U.S. 372, 384 (1892).

The same considerations of judicial economy noted in *American Construction* are applicable here. The class action certification order may become "quite unimportant by reason of the final result, or of intervening matters." If, for example, petitioners prevail in their defense on the merits before the District Court, the class action certification order would be of no concern to the petitioners.

A premature invocation of the appellate process here would present a grave danger of interfering with the proceedings now being held before the District Court. For example, the class action notices have not yet been mailed to class members. At a recent status conference held before the District Court, the petitioners' attorneys urged the Court to further stay the mailing of the notices, on the ground that petitioners are now asking that the Supreme Court

review, by means of a writ of certiorari, the propriety of the class action certification order. That petitioners are able, over two and one half years after these cases were certified as class actions, to point to possible Supreme Court review of these orders as a reason for staying the mailing of class notices, can only result in further delay of cases which have already suffered far too much from that malady. Only by promptly denying petitioners' writ may this Court insure that the proceedings before the District Court go forward, and be terminated, in an expeditious manner.

If orderly appellate procedures are to be the rule of our judicial system, and if chaos and impossibly overcrowded dockets are to be denied free rein therein, this Court must deny the petition as premature.

THE CLASS ACTION CERTIFICATION ORDER DOES NOT ABROGATE PETITIONERS' SEVENTH AMENDMENT RIGHT TO A JURY TRIAL.

The class action order entered by the District Court provides for trial on the "common" issues first, excluding from the fact-triers consideration, at that time, any so-called "individual issues":

> "(a) As to issues of liability of general application, excluding the following issues: reliance or causation, duty owed to the individual claimant insofar as it may vary depending upon the status of that claimant, knowledge of the claimant investor as to facts allegedly misrepresented or omitted, statute of limitations, laches, waiver, estoppel, ratification, unclean hands and pari delicto;
>
> "(b) As to the issue of damages only to the extent of determining the value of the interests received by investors, together with loss of profits, if any, within the meaning of California Civil Code Section 3343, up to the time of trial."

As provided in the same order, any "individual issues" will be tried within 90 days after notice to the class members of a decree or judgment, if such decree or judgment is in favor of plaintiffs:

> "6. As to all issues excluded from class action maintenance herein, said excluded issues will be reversed for future determination upon individual claims filed hereunder by any member of the classes as above set forth, such claims to be made within 90 days after notice of such class members of the decree or judgment herein, if such decree or judgment in favor of plaintiffs."

The class action order, then, provides for a trial which is bifurcated between those issues which are common to all class members, and those issues, if any, which are individual to the class members. The Court of Appeals praised the District Court's class action certification order as "novel" and "innovative". Petitioners have seized upon the Court's use of these terms, in an attempt to make the order appear as a grotesque and radical departure from any order which could possibly be entered by a court enforcing the laws of a civilized nation.

With all due respect to the Court of Appeals, the Order entered by the District Court is neither novel

nor innovative. Instead, the order is a practicable, sound, and time-tested method of dealing with class action trials. Not only is bifurcation of issues at trial expressly permitted by Rules 23 and 42 of the Federal Rules of Civil Procedure, but the courts have actually entered class action certification orders which provide for bifurcation of issues:

> "We see no sound reason why the trial court, if it determines individual reliance is an essential element of the proof, cannot order separate trials on that particular issue, as on the question of damages, if necessary. The effective administration of 23(b) (3) will often require the use of the 'sensible device' of split trials. *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968).
>
> * * *
>
> "Defendants have pleaded additional defenses of estoppel, waiver, release and the statute of limitations. The first three apply, if at all, only to certain plaintiffs, not to every one. These issues, therefore, are also deferred.
>
> "I will treat the defense of the statute of limitations in the same way. This may depend to some extent upon the knowledge of individual plaintiffs. Therefore, the question can more readily be determined when the evidence with respect to each separate plaintiff is reviewed." *Escott v. Bar Chris Construction Corp.*, 283 F. Supp. 643, 704 (S.D.N.Y. 1968).

As the late Judge Frankel observed, the "split trial" procedure is a preferable, and sometimes required, method of dealing with class actions:

> "In the cases to which I refer, assertedly under (b)(3)—i.e., having both common issues and issues affecting separately the individual members of the class—district judges have apparently thought that all members of the class would have to be brought before the court—for discovery as well as trial—before there could be any judgment affecting the class as a whole. Insofar as this premise lurks in the cited cases, it would appear to be unwarranted. Take, for example, the simple model of the case by an alleged class of securities purchasers charging fraudulent representations. There are, supposedly, common questions as to the nature of the alleged representations, falsity, and materiality. If some or all such questions are decided against the plaintiff class, the complaint will be dismissed and, always assuming adequate representation of the class, there will be a judgment binding the class without requiring any but the representative members to have been before the court.
>
> "On the other hand, if the plaintiff class prevails on the common questions, it will then—but only then—become necessary to try or settle or otherwise dispose of individual questions like reliance, damages, or the like. If the common questions have been aptly defined, there should be no need at an earlier stage to have all the individual class members before the court for discovery or any other purpose.
>
> "In other words, the effective administration of (b)(3) actions will probably require wide use of the already familiar device of split trials. And I submit that a lively awareness of this sensible device should serve to postpone or minimize some

of the excessively frightening complications that seem overwhelming from a threshold view of the case." Frankel, *Some Preliminary Observation Concerning Civil Rule 23,* 43 F.R.D. 39, 47 (1966).

The above-quoted authorities make it clear, then, that "split trials" are a useful and widely accepted tool for simplifying class action trials.

Petitioners make three main arguments in support of their contention that the order violates their Seventh Amendment right to a jury trial. *First,* they contend that there exist substantial numbers of issues individual to each member of the class. *Second,* they contend that these issues are so "inextricably intertwined" with issues common to all members of the class as to require, as a matter of law, that the same jury which acts as fact-finder on the common issues must also do so with respect to the individual issues. *Third,* petitioners claim that it would be impossible for the same jury to hear both the individual and the common issues, and that the class action order is therefore violative of petitioners' constitutional right to a trial by jury.

None of these arguments has merit. If Rule 23 is to have a continued meaningful existence, petitioners' tortured analysis of the right to a jury trial, and of the relationship of this right to Rule 23, must be summarily rejected by this Court.

THE DISTRICT COURT'S BIFURCATION OF ISSUES IN THE CLASS ACTION ORDER DOES NOT MEAN THAT THE COURT HAS RECOGNIZED THE EXISTENCE OF NON-COMMON ISSUES.

Petitioners contend that their Seventh Amendment right to a jury trial is abrogated by the bifurcation of common and individual issues. This contention is based, of course, upon the assumption that there are substantial numbers of individual issues to be tried in the *Ebner, Howenstine* and *Kaufman* cases. This assumption is incorrect.

The petitioners have long contended, to both the District Court and the Court of Appeals, that the three class actions abound with individual issues. Petitioners' purpose in so contending, of course, was to persuade these tribunals that common questions of law and fact do not predominate over individual questions, and hence that the plaintiffs had not met the prerequisites of Rule 23(b)(3). However, while petitioners have spent much effort in contending that individual issues exist in great multitudes, they have never seen fit to actually present evidence in support of their contention.[2] The petition is a prime example of petitioners' willingness to assert the existence of individual issues, but their unwillingness to present

[2]By contrast, respondents presented to both the District Court and the Court of Appeals abundant evidence to demonstrate that the issues in these cases are common to the class members. Among the evidence introduced by the respondents were the GeoTek registration statement and prospectuses, the J. B. Oil Company offering circulars, the J. B. Oil Company financial statements, the J. B. Oil Company Program Agreements, the Petroleum-2000 offering circular, and the Petroforce offering circular. These are all identically worded documents which were sent to each class member.

anything to the Court to support that assertion. For example, on page 24 of their petition, the petitioners point to a number of so-called individual issues, including the "defenses of waiver, estoppel, laches, ratification, unclean hands, statutes of limitations, and *pari delicto*", Petition page 24. However, nowhere in the record before this Court, or any other court, is there evidence that anything in this impressive parade of "defenses" bars the claims made by any of the class members. Petitioners evidently wish this Court to accept, as an act of faith, their assertion that "substantial numbers of the purported investor-class are subject to [individual] defenses . . ." Petition page 24.

Petitioners contend that "The District Court correctly recognized the substantial nature of non-common issues raised by this evidence and that the three actions could not possibly proceed as class actions upon these issues" Petition page 10. This statement is simply incorrect; the District Court has never ruled that non-common issues are substantial, or even that they exist at all. This is clear from the face of class action certification order:

> "4. In reserving issues for later determination, the Court does not intend to rule upon either the legal or factual sufficiency or necessity of such issues." Appendix to Petition, page A31.

The Court of Appeals, in its decision, expressly noted that petitioners had failed to show that individual issues did in fact exist to any substantial degree:

> "Another issue reserved for later determination by the district court's order concerns the amount of information which any particular claimant had or learned about the J. B. Ventures, the GeoTek partnerships, or any of the related corporations, either at the time of the purchase of interests or at some later date prior to the time of fraud perpetrated by Burke and others was disclosed to the public. Evidence of such knowledge, say the petitioners, in [sic] relevant to their basic defenses, of non-reliance and to such other defenses as waiver, estoppel, laches, and statute of limitations. To the extent these issues are not common to the classes, see note 10, supra, we do not think the district judge erred simply by separating them out for individual adjudication at the close of the class trial. The petitioners have again failed to demonstrate that the existence of this issue is so prevalent among the claimants that they will present much proof on the issue at the later trial. Absent such a showing, we deem it entirely appropriate for the district judge to separate out those issues for later adjudication with respect to the relatively few claims to which they are pertinent." Appendix to Petition, page A21.

Petitioners raise the specter of these "individual" non-issues in a transparent and desperate attempt to portray the *Ebner, Howenstine,* and *Kaufman* actions as extraordinarily complex actions, in which it will be necessary at trial for petitioners to examine hundreds or thousands of investors, in order to properly determine whether such investors are subject to defenses such as *pari delicto.* Petitioners have totally failed to show the existence of "individual" issues applicable

to substantial numbers of the class. On that basis alone, the Court should deny the petition.

UNCONTRADICTED AUTHORITY SANCTIONS THE "SPLIT TRIAL" DEVICE ORDERED HERE BY THE DISTRICT COURT.

Petitioners contend that, under the Seventh Amendment, they have an absolute right to a "unitary" jury trial. According to petitioners, the Seventh Amendment right to a jury trial will be abrogated unless all issues, whether common or individual, are tried by one jury at a single hearing.

Clearly, petitioners are entitled to a jury trial under the Seventh Amendment. Respondents have no quarrel with that proposition. It is petitioners' extraordinarily convoluted interpretation of the Seventh Amendment to which respondents take complete exception.

The text of the Seventh Amendment itself does not prohibit the submission of separate issues in the same case before different juries. Neither does the amendment explicitly require that all issues be submitted to a jury at "a single hearing" (petition page 17).

Rule 42(b) of the Federal Rules of Civil Procedure specifically authorizes district courts to order separate trials on "separate issues":

> "(b) SEPARATE TRIALS. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, *or of any separate issue* or of any number of claims, cross-claims, counterclaims, or third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States." Fed. Rules Civ. Proc. 42(b) (emphasis added).

The leading case of *Gasoline Products Co. v. Chamlin Refining,* 283 U.S. 494 (1931), makes it clear that the right to a trial by jury does not preclude courts from employing innovative methods of effectuating that right:

> "All of vital significance in trial by jury is that issues of fact be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law. [Citations omitted]. Beyond this, the Seventh Amendment does not exact the retention of old forms of procedure." 283 U.S. at 498 (1931).

As Justice Brandeis stated in the *Matter of Walter Peterson,* 253 U.S. 300 (1920):

> "New devices may be used to adapt the ancient institution [the jury trial] to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with." 253 U.S. 300, 310.

Petitioners claim that the Seventh Amendment requires that all issues be presented to the trier of fact at a single hearing. The rationale behind this claim is not evident to respondents. The courts have repeatedly held that the Seventh Amendment does not require that all issues be submitted to the trier of fact during a single hearing. The case of *Hosie v. Chicago Western Railway Company,* 282 F.2d 639 (7th Cir. 1960), cert. den. 365 U.S. 814, squarely ruled that issues need not be submitted to the trier of fact at a single hearing:

> "There remains for consideration the very important question of whether plaintiff was deprived of a jury trial in violation of the Seventh Amendment of the Constitution of the United States when the trial court *sua sponte* and over the objection of plaintiff, ordered the case to proceed to trial solely on the issue of liability.
>
> "We hold that in the trial of the instant case, the essential character of a trial by jury was preserved. In our view, the Seventh Amendment does not require the retention of all the old forms of procedure; nor does it prohibit the introduction of new methods for ascertaining what facts are in issue. See Gasoline Products Co. Inc. v. Champlin Refining Co., 283 U.S. 494, 497-498, 51 S.Ct. 513, 75 L.Ed. 1188.
>
> * * *
>
> "Many of the federal district courts of this country are laboring under the heavy burden of crowded trial dockets. The Northern District of Illinois is no exception. The judges of that court should be commended for their search for methods and means to expedite the disposition of cases

> upon their calendars. There is no doubt that in numerous cases, the severing of the issue of liability from the issue of damages will result in the shortening of the time of trial. The instant case is a good example. Without such severance, hours or even a day or two might have been consumed on the issue of damages." 282 F.2d 639, 642-643.

Professor Wright has made the following observation:

> "There is no doubt that the court can order separate trials of issues, with the same jury sitting in each trial, and it seems to be accepted that the better and preferred practice is to use the same jury for all issues, even though it may hear the issues at different times. The issue can thus be narrowed to whether the admittedly preferred procedure is consitutionally required. It has been held, on sound ground, that the Seventh Amendment is not violated by the separate submission of the issues to a single jury." *Federal Courts,* 1963 Ed. Charles Alan Wright, page 378 (citations omitted).

Petitioners also contend that the same jury which decides the common issues must also decide the individual issues. Petitioners claim, in an effort to convince the Court that certiorari is appropriate here, that the lower courts which have attempted to deal with this issue need guidance because of "the unsettled and contradictory opinions of judges of the Courts of Appeals . . ." Petition page 15.

Contrary to petitioners' assertions, the lower courts are not in the least "confused" by the issues presented

here. They have uniformly ruled that the Seventh Amendment does not require all issues to be decided by one jury.

The courts have often ordered bifurcation between liability and damage issues at trial. Inevitably, Seventh Amendment issues have been raised in some of these cases. In the leading case of *O'Donnell v. Watson Bros. Transportation Co.,* 183 F.Supp. 577 (N.D. Ill. 1960), the Court upheld the constitutionality of its local rule authorizing separate trials, *by different juries,* of the liability and damage issues in civil cases:

> "The Rule provides that the trial judge may, in his discretion, order one jury to decide upon the liability of the defendant and the same or another jury to determine the damages of the plaintiffs. The judge may recess after a decision of guilty on liability for pre-trial or settlement conference or proceed with the trial. The right to a trial by jury does not require that all issues be determined by the same jury and severance of the issues is not violative of any constitutional guarantee." 183 F.Supp. 585.

Similarly, in *Swofford v. B & W, Inc.,* 34 F.R.D. 15 (S.D. Tex. 1963), *aff'd* 336 F.2d 406 (5th Cir. 1964), *cert. denied* 379 U.S. 962, it was held that issues of liability and damages could be tried before different juries without encroachment upon the Seventh Amendment guarantee:

> "[P]laintiffs suggest that to try the issues of liability and damages to separate juries, requisite in this case if separate trials should be ordered,

> would be a deprivation of jury trial as contemplated by the Seventh Amendment. Although the question has not yet been authoritatively settled, the Court feels that there is no violation of the Seventh Amendment by a separate submission of issues to separate juries under proper circumstances." 34 F.R.D. at 20.

The issue of whether bifurcated trials violate a party's right to a jury trial has also been raised by defendants in other class action cases in vain attempts to avoid class certification. In the case of *Link v. Mercedes-Benz of N. Am., Inc.,* 550 F.2d 860 (3rd Cir. 1977), *cert. den.,* 45 U.S.L.W. 3762, the Court relied on *Gasoline Products* in rejecting an argument identical to the one which petitioners make here:

> "The legal issue which is inextricable from the merits of the district court's class action determination arises from the demand by defendants for a unitary jury trial of the § 4 Clayton Act damage claim. In making that demand the defendants rely upon the Seventh Amendment which, they urge, guarantees a trial before a single jury rather than separate juries as contemplated by the district court. But defendants somewhat overstate the reach of that Amendment. In the seminal case, Gasoline Products v. Champlin Refining Co., 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188 (1931), the Supreme Court held that the Seventh Amendment right to jury trial is not abrogated when an appellate court orders a new trial only on one of the issues originally tried before a unitary jury in the court below. The Court reasoned that the Seventh Amend-

ment guaranteed a unitary jury trial only of issues, not of cases:

* * *

"Gasoline Products does not suggest that its distinction between issues as opposed to cases is limited to retrials, and given the analysis which the Court made, no Seventh Amendment policy suggests such a limitation. Thus, I agree with the Fifth and Tenth Circuits, and with the commentators, that the Seventh Amendment guarantees a unitary trial of issues, not of cases, even in the first instance." 550 F.2d 860, 874-875.

See also the discussion of the interaction between bifurcated trials and the Seventh Amendment in the case of *State of Alabama v. Blue Bird Body Co., Inc.*, 71 F.R.D. 606 at 613-615 (M.D. Ala. 1976). The Court there concluded that bifurcation of issues did not preclude class certification by virtue of the Seventh Amendment:

"On the basis of the foregoing reasoning and its conclusion that the issues of liability and damages in this action are separable and distinct, this Court holds, while recognizing that the matter is not free from doubt, that Defendants' right to a jury trial would not be violated by trials by separate juries of these two issues. The Court, therefore, finds that a class action would be a superior means of proceeding with this litigation as required by Rule 23(b)(3)." 71 F.R.D. 606, 615.

The lower courts, then, have consistently followed the principles enunciated in *Gasoline Products* in holding that bifurcated trials, decided by more than one jury, are not violative of the Seventh Amendment. In view of the lower courts' consistent adherence to these principles, it is difficult to understand how the granting of certiorari would provide valuable guidance to the lower courts.

It is true that submission of different issues to different juries may be impermissible in some circumstances. According to the opinion in *Gasoline Products* (followed in *United Air Lines v. Wiener*, 286 F.2d 302 (9th Cir. 1961), cert. den., 366 U.S. 924), separate juries may decide separate issues only if those issues are "so distinct and separable" from one another that separate trials "may be had without injustice." 286 F.2d 302, 306. Or, as further stated in the *United Air Lines* opinion, the question turns on whether one issue is "so interwoven" with a second issue that "the former cannot be submitted to the jury independently of the latter without confusion and uncertainty which would amount to a denial of a fair trial." 286 F.2d 302, 306.

Petitioners assert that the individual issues are "so interwoven" with the common issues as to require that one jury decide both the common and the individual issues. On pages 21 through 25 of the petition, the petitioners purportedly "analyze" the individual issues, in an attempt to show that the individual issues are inextricably interwoven with the common issues. The effort is unavailing. Only by indulging in complete fantasy, could one conclude that the individual issues are inextricably interwoven with the common issues. As we will demonstrate

below, the individual issues, if any, are separate and distinct from the common issues.

Petitioners claim that four groups of individual issues are inextricably intertwined with the common issues. These groups of issues are described as follows:

(1) Whether the communications to investors were misleading (petition p. 21);

(2) Whether the investor relied on the misleading communications (petition p. 22);

(3) Whether the class members are barred by the defenses of estoppel, laches, clean hands, statutes of limitations, and *pari delicto* (petition p. 24);

(4) Whether each class member suffered any damage, and if so, how much (petition p. 25).

The Court of Appeals concluded that these "issues" do not exist to any substantial degree, and the petition here does nothing to demonstrate that this conclusion was erroneous. However, even if it is assumed that these defenses are applicable to a substantial number of class members, such defenses are not "inextricably intertwined" with the common issues. The petitioners do not show otherwise, nor could they ever make such a showing.

The petitioners claim that the issue of whether a particular written communication is misleading is not separate and distinct from the common issues, and therefore must be tried before the same jury which

also decides the common issues. This argument is totally devoid of merit for at least two reasons. *First,* the class action certification order does not reserve for later determination the issue of whether the communications were misleading. This is an issue common to the class which will be tried during the first phase of the trial. *Second,* this issue is separate from other issues in the case. Petitioners claim that:

> "In determining whether communications to an investor were misleading, the trier of fact must analyze all of the contemporary oral and written communications in their totality, rather than focusing upon only one such communication, and must consider the sophistication, motivations and actual knowledge of each investor, derived from sources other than the black and white of a prospectus, at least here where direct personal sales, entailing numerous oral communications by salesmen, sophisticated investors and their advisors, are involved, not broad, impersonal securities market transactions." Petition page 22.

Petitioners have often employed this argument, always unsuccessfully, in order to convince the District Court and the Court of Appeals that class certification would result in the "necessity" for thousands of "mini trials." In particular, petitioners claim that evidence of oral statements made to the investors influences the question of whether a written communication is misleading. This is simply not the law. *Igenito v. Bermac Corp.,* 376 F.Supp. 1154 (S.D. N.Y. 1974) exposes the fallacy of petitioners' argument:

> "Since, as we have noted, reliance on the prospectus need not be proven at trial, it is immaterial whether other, possibly non-misleading, representations were made to the post-prospectus herdowners in the course of the sales presentation. Proof that the prospectus was materially misleading, and that defendants acted with the requisite scienter . . . is enough to establish liability, even if plaintiffs bought solely on a tip from the man in the moon." 376 F.Supp. at 1169.

The argument that reliance is inextricably intertwined with other issues is equally specious. Under this Court's decision in *Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972), reliance is not an element of a Rule 10b-5 claim:

> "Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of [his investment] decision [citations omitted]. *This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact.*" 406 U.S. 153-154 (emphasis added).

As to the third so-called group of "individual issues"—estoppel, laches, ratification, unclean hands, statutes of limitations, and *pari delicto*—petitioners have totally failed to show that they are inextricably intertwined with any common issues. Petitioners merely make the gratuitous claim, backed up by no

facts or law, that "the resolution of such issues cannot be accomplished rationally without considering the total circumstances involved". Petition page 25.

Lastly, petitioners claim that damage issues are somehow inseparable from the common issues. Here again petitioners point to "the totality of the circumstances applicable to each investor," (petition page 25), including the "tax benefits" which each class member supposedly received from his investment. However, it has long been settled that tax savings which a plaintiff realizes as a result of a defendant's wrongdoing are not to be considered in calculating damages. *See, e.g., Cereal Byproducts Co. v. Hall,* 16 Ill.App.2d 79, 147 N.E.2d 383 (1958); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.,* 392 U.S. 481, 503 (1968); *Rhode v. Hershberger Explorations Inc.,* 349 F.Supp. 993, 994 (D.Minn. 1972).

The separability of these issues stands in sharp contrast to the inseparable issues in *United Airlines, Inc. v. Wiener, supra.* In the *United* case, the Court held that the same jury which had decided liability must also decide the amount of punitive damages to be awarded. Without doubt, punitive damages are inextricably intertwined with liability issues. The amount of punitive damages which a jury may award is dependent on various factors, such as the presence or absence of malice and the degree of the outrageous nature of the defendant's acts. These damage issues are also issues which must be proven during the liability phase of the case. Petitioners' attempt to fit the three class actions into the *United* mold is un-

availing; the facts are simply not similar to those in *United.*

The Court of Appeals concluded, after reviewing all the evidence which was before the District Court, that the individual issues were separable from the common issues. We respectfully submit that this was the only conclusion which the Court could have properly reached. This Court should not now review that decision.

THERE IS NOTHING IN THE CLASS ACTION CERTIFICATION WHICH PRECLUDES THE SAME JURY FROM DECIDING BOTH THE COMMON ISSUES AND THE INDIVIDUAL ISSUES.

Even if it is assumed that there are individual issues to be tried, and even if it is assumed that these issues must be tried before the same jury which decides the common issues, the class action certification order does not abrogate petitioners' Seventh Amendment right to a jury trial. There is no reason why one jury could not decide both the common issues and the individual issues as well. The class action certification order does not require that one jury decide the common issues, and another jury the individual issues. The class action certification order is silent on this point.

It is premature, to say the least, for the petitioners to complain of a contingency which may never occur. As the Court of Appeals stated in its opinion:

> "Petitioners characterize as 'disingenuous' the suggestion that trial of all issues in these cases will be had before one jury. There is nothing in

> the district court order that would preclude such a procedure, as a practical matter, and we find nothing inherently wrong with such a procedure. It may be that the district court does not contemplate this procedure, but it would be presumptuous of us to assume the district court's intention in this regard." 549 F.2d 686, 693, footnote 9.

In the case of *Link v. Mercedes-Benz of N. Am., Inc.,* 550 F.2d 860 (3rd Cir. 1977), *cert. den.,* 45 U.S. L.W. 3762, the Court also dealt with an argument almost identical to that raised by the petitioners here. In *Link*, the Court stated as follows:

> "The second question certified by the district court is the propriety of having separate juries for each segment of the bifurcated trial. The court, however, entered no order directing separate juries and whether it will is a matter of pure speculation at this juncture." 550 F.2d 860, 864.

In the case of *In Re Master Key Antitrust Litigation*, 528 F.2d 5 (2nd Cir. 1975), the Court of Appeals refused to vacate a class action certification order entered by the District Court. The Court responded as follows to petitioners' arguments that bifurcation was offensive to the Seventh Amendment:

> "It would plainly be premature for us to rule on the appropriateness of using two juries where only one, in fact, may be involved. We should only note that bifurcated trials have frequently been employed with great success." 528 F.2d 5, 15 (citations omitted).

Petitioners claim that as a practical matter, one jury could not possibly decide both the common and the individual issues, because by the terms of the class certification order, there is at least a 90-day lapse of time between the trial of the common issues and the trial, if any, of the individual issues. There are two simple answers to this contention.

First, a 90-day lapse between the trial of the common and the individual issues does not necessarily preclude one jury from deciding issues presented during both phases of the trial. One jury could well decide one particular phase of a case, and then return 90 days later and decide the remaining issues. *Second*, if the District Court decides that a 90-day interval between the two phases of the trial is excessive, the Court may modify its class action certification order to provide for a shorter time interval. Here, as with all class actions, the District Court has the power to modify the class action certification order if such modification is warranted. Because of the flexibility which the Court has in altering class action orders, the petitioners can easily move before the District Court for a shortening of the 90-day interval set forth in the District Court's order, rather than making matters of this nature the subject of a petition for a writ of certiorari.

THE COURT OF APPEALS DID NOT ADOPT AN INCORRECT STANDARD FOR REVIEW OF THE DISTRICT COURT'S ORDERS.

Petitioners also argue that the Court of Appeals adopted an incorrect standard for review by mandamus. This argument is based on the premise that the petitioners' Seventh Amendment rights have been abrogated, and that therefore the Court must employ a standard of review by mandamus less stringent than "clear and indisputable error." The premise itself, though, is inaccurate; the petitioners' right to a jury trial has not been abrogated. Neither do any of the authorities cited by petitioners hold that a more liberal standard of review on mandamus must be employed whenever a party claims that his right to a jury trial has been abrogated. We submit that the weak showing made by the petitioners both here and before the Court of Appeals is insufficient reason to deviate from the normal standards of mandamus review.

CONCLUSION

It may be true, as petitioners contend, that the substantive law has sometimes been altered to permit class certification. If this is an abuse which this Court should not tolerate, it is equally important that this Court reject petitioners' arguments based on a

Seventh Amendment which has been tortured into unrecognizable form in order to avoid class certification. We respectfully submit that the petition is premature and totally lacks merit, and should be denied by this Court.

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August 5, 1977.